

# Daily Journal

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## GUEST COLUMN

# DOJ maintains antitrust focus with latest probe into Live Nation, Ticketmaster

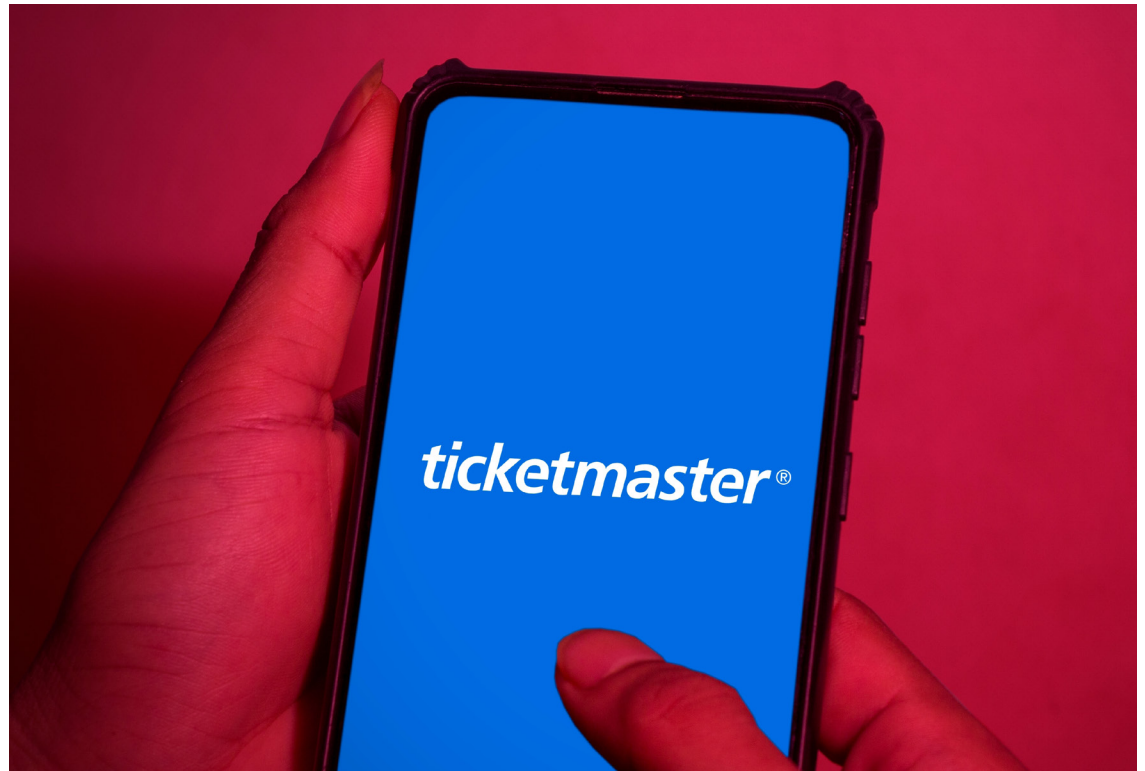
By Jason D. Russell  
and Zack Faigen

When Ticketmaster crashed in November 2022 during a fan pre-sale for Taylor Swift's Eras Tour, it produced a rare moment in American politics: bipartisan unity among Democrats and Republicans. In the weeks and months that followed the crash, federal lawmakers on both sides of the aisle jumped to the defense of Swifties everywhere, publicly assailing both Ticketmaster and its parent company Live Nation Entertainment (usually by means of painful puns and forced wordplay based on lyrics from Swift's best-known pop hits).

Now, a year on from the infamous Ticketmaster crash, the U.S. Justice Department is once again ramping up its investigation into Live Nation's business practices. According to a recent report from the Wall Street Journal, the DOJ is probing whether Live Nation has engaged in anticompetitive behavior in one or more of its promotional, ticketing, or venue-operating business segments. While the exact parameters and theories underlying the DOJ investigation remain unclear, any action the Justice Department takes could have a profound effect on Live Nation and the entire live entertainment industry.

### How we got here

The origins of the DOJ investigation date back to 2010, when concert promoter Live Nation Inc.



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acquired Ticketmaster Entertainment, Inc., the leading concert ticketing service. Before approving this "vertical merger" – which means the two merging entities were not competitors, but operated in the same industry at different points in the supply chain – the Justice Department imposed various conditions on Live Nation through a so-called consent decree. Among other things, the consent decree prohibited Live Nation from requiring concert venues to use Ticketmaster as their ticketing ser-

vice in order to secure Live Nation tours and events. It also prohibited Live Nation from retaliating against venues that chose a different ticketing agency. The consent decree was set to last a decade.

In 2019, the Justice Department investigated Live Nation for potential violations of the consent decree. Live Nation's competitors accused the entertainment behemoth of using its market power and deep roster of artists to do precisely what the consent decree forbade – effectively force venues to use

Ticketmaster as their exclusive ticketing service, or else risk missing out on Live Nation's tours and talent.

In December 2019, Live Nation reached an agreement with the DOJ to resolve the investigation. The agreement made certain small modifications to the consent decree, and extended its term another five years, to 2025.

In 2022, the DOJ started investigating Live Nation again. This time, however, it appears the scope of the investigation may be broader

than in 2019. According to the Wall Street Journal, the Justice Department is investigating not only alleged efforts to coerce concert venues into using Ticketmaster as their exclusive ticketing agency, but also agreements between Live Nation and the artists it represents to determine whether those agreements contain restrictions that violate the consent decree or otherwise constitute improper anti-competitive conduct. The Department has reportedly sent letters to talent agencies that help arrange those artist agreements.

### What comes next

When and how the latest probe will conclude remains uncertain, given the lack of clarity or public statements from the DOJ regarding the scope or stage of its investigation. Based on what we do know, however, the Department could be focusing on potential antitrust harm to at least five sets of players in the industry.

First, the Department could be looking at antitrust harm to rival concert promoters under the theory that Live Nation is using its market power to unfairly corner the market on talent. According to the Journal, rival promoters have complained that Live Nation is able to outbid them to secure top-selling talent, and that Live Nation is able to make up for overpaying talent by (i) routing those artists' shows to venues that Live Nation owns

and (ii) ensuring that Ticketmaster is used as the ticketing service for those shows.

Second, the Department could be scrutinizing potential harm to rival venue operators under the theory that Live Nation is coercing those venues to use Ticketmaster as their exclusive ticketing service provider, or else risk losing out on Live Nation's tours and artists. Doing so could cause venue operators to pay more for ticketing services than they otherwise would in a truly competitive marketplace.

Third, the DOJ could be investigating potential harm to Ticketmaster's rival ticketing companies, such as AXS, StubHub or SeatGeek. The Department may be concerned that Live Nation is using its artist relationships – and its ability to redirect where those artists play their shows – to ensure that venues use Ticketmaster as their exclusive ticketing service, causing harm to any Ticketmaster competitor.

Fourth, the Department could be examining potential harm to artists. According to both rival promoters and Live Nation itself, Live Nation pays artists more than competitors are willing to pay, which is how Live Nation has secured such a deep roster of talent. That, however, may not be universally true or dispositive. According to Clyde Lawrence, a musician who testified before a Senate committee earlier this year, Live Nation holds such

market power across the live entertainment marketplace that it is able to unilaterally dictate the terms and pricing of artist agreements.

Finally, the Department could be examining potential harm to fans and concert-goers. This theory supposes that Live Nation – and Ticketmaster in particular – holds such market power in the ticketing service industry that it can impose fees without fear of losing business, and that it has no incentive to improve the ticketing process or the services it provides.

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However the DOJ investigation turns out, it is important to re-

member that market power – and even monopoly power – is not necessarily unlawful. Rather, the antitrust laws prohibit companies from acquiring or maintaining monopoly power only when that power is obtained through competitively unreasonable conduct. Thus, whether Live Nation is a dominant player in the live music industry, or Ticketmaster is the dominant ticketing service agency, is not the sole issue. The critical issue will be if the Justice Department determines that Live Nation or Ticketmaster acquired or maintained its dominant market power through improper means to stifle and prevent competition.

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