

COMPLETED ACQUISITION BY PUG LLC OF THE STUBHUB BUSINESS OF EBAY INC.

Notice of possible remedies under Rule 12 of the CMA's rules of procedure for merger, market and special reference groups¹

Introduction

1. On 25 June 2020, the Competition and Markets Authority (CMA), in exercise of its duty under section 22(1) of the Enterprise Act 2002 (the Act), referred the completed acquisition by PUG LLC (a subsidiary of Pugnacious Endeavours, Inc. (viagogo)) of StubHub, Inc., StubHub (UK) Limited, StubHub Europe S.à.r.l., StubHub India Private Limited, StubHub International Limited, StubHub Taiwan Co., Ltd., StubHub GmbH, and Todoentradas, S.L. (together, StubHub) (the Merger), for further investigation and report by a group of CMA panel members (the Inquiry Group).
2. The Merger completed on 13 February 2020. The CMA imposed an Initial Enforcement Order² (IEO) on 7 February 2020 requiring viagogo and StubHub to remain independent during the inquiry to ensure that no action is taken pending final determination of the Reference which might prejudice the Reference or impede the taking of any action by the CMA under Part 3 of the Act which might be justified by the CMA's decisions on the Reference. On 3 July 2020, the IEO was superseded by an Interim Order.³
3. In its provisional findings on the reference notified to viagogo and StubHub (the Parties) on 22 October 2020, the Inquiry Group, among other things, provisionally concluded that the Merger has resulted in the creation of a relevant merger situation, and that the creation of that situation has resulted or may be expected to result in a substantial lessening of competition (SLC) in the supply of uncapped secondary ticketing platform services for the resale of tickets to UK events.
4. Our analysis provisionally indicates that this SLC has resulted or may be expected to result in adverse effects, for example in the form of higher fees for resellers and/or buyers, worse non-price terms and conditions for resellers

¹ CMA Rules of Procedure for Merger, Market and Special Reference Groups (CMA17, 2014).

² [Initial Enforcement Order](#)

³ [Interim Order](#)

and/or buyers, a lower quality of customer service and reduced innovation (eg in functionalities and improving its ease of use) compared to what would otherwise have been the case absent the Merger.

5. This Notice sets out the actions which we consider the Inquiry Group might take for the purpose of remedying the SLC and/or any resulting adverse effects identified in the Provisional Findings Report.⁴
6. We invite comments on possible remedies by 5:00pm on 5 November 2020.⁵

Criteria

7. In deciding on a remedy, the CMA shall in particular have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to remedy the SLC and any adverse effects resulting from it.⁶
8. To this end, the CMA will seek remedies that are effective in addressing the SLC and its resulting adverse effects and will select the least costly and intrusive remedy that it considers to be effective.
9. The CMA will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects.⁷

Possible remedies on which views are sought

10. In merger inquiries, the CMA will generally prefer structural remedies, such as divestiture or prohibition, rather than behavioural remedies because:
 - (a) structural remedies are likely to deal with an SLC and its resulting adverse effects directly and comprehensively at source by restoring the rivalry that would be lost as a result of the merger;
 - (b) behavioural remedies may not have an effective impact on the SLC and its resulting adverse effects, and may create significant costly distortions in market outcomes; and

⁴ [Provisional Findings Report](#), CMA's viagogo / Stubhub casepage

⁵ Date: Responses to the Notice of Possible Remedies are typically requested within 14 days of publication of the Notice (and in any event, no less than seven days) so that they can be considered before response hearings (CMA 2 Mergers: guidance on the CMA's jurisdiction and procedure, paragraph 13.1)

⁶ Sections 35(4) and 36(3) of the Act.

⁷ [Merger Remedies: CMA87](#) (December 2018), paragraph 3.3 and 3.4.

- (c) structural remedies do not normally require ongoing monitoring and enforcement once implemented.⁸
11. CMA staff have had initial, without prejudice, discussions with viagogo regarding the possible scope and composition of a remedy should a provisional SLC be found, and the possible risks arising from different remedy options.⁹ In the course of these discussions, viagogo has put forward a possible remedy proposal which is being considered by the CMA staff.
 12. At this stage, the CMA has identified the following potential structural remedies:
 - (a) Requiring the full divestiture of either StubHub or viagogo.
 - (b) Requiring the divestiture of part of StubHub or viagogo.
 13. We consider that a full divestiture of StubHub or viagogo would be similar to a prohibition of the Merger as it would prevent an SLC from resulting in the relevant market. We therefore take the preliminary view that, subject to implementation considerations, a full divestiture of either party would represent a comprehensive and effective remedy to all aspects of the SLC we have provisionally found, and consequently any resulting adverse effects.
 14. The objective of a partial divestiture of StubHub or viagogo would be to create similar competitive conditions in the relevant market as set out in our chosen counterfactual, ie the prevailing conditions of competition at the time of the Merger, taking into account the effects of the Coronavirus (COVID-19) pandemic. Our preliminary view is that any divestiture should comprise at least the assets and operations of either StubHub or viagogo that cover the relevant market – the supply of uncapped secondary ticketing platform services for the resale of tickets to UK events. However, to ensure an effective and comprehensive solution to the SLC it may be necessary to include additional assets or operations.
 15. We understand that a partial divestiture may involve amalgamating assets and operations from different legal entities within the StubHub and/or viagogo businesses, and may also entail splitting shared functions between those to be divested and those to be retained by the merged entity.
 16. In this situation, there are two ways in which a divestiture package might be assembled:

⁸ *Merger Remedies: CMA87* (December 2018), paragraph 3.46. This has been adopted by the CMA board.

⁹ *Merger Remedies: CMA87* (December 2018), paragraph 4.55.

- (a) The assets and operations to be divested are carved out to create a divestiture package (carve-out option);
 - (b) Alternatively, the divestiture package initially comprises the whole viagogo or StubHub business (as for full divestiture), and then the assets and operations that are not part of the divestiture package are carved out of the divestiture package and transferred back to the merged business (reverse carve-out option).
- 17. Both options introduce significant composition, asset and execution risks. However, under the carve-out option these risks would be mainly borne by the purchaser and customers of the divested business, whereas under the reverse carve-out option most of these risks would be borne by the Parties. Our preliminary view is that the reverse carve-out option is preferable given it has a lower risk of not being effective. However, if the Parties wish to pursue either option, they will need to provide convincing evidence that these risks can be managed and a comprehensive solution to our provisional SLC achieved.
- 18. Our preliminary view is that any partial divestiture could only be considered effective if it could be demonstrated that it could be appropriately configured to attract a suitable purchaser and to allow a purchaser to operate as an effective competitor in the relevant market and.
- 19. Moreover, with any partial divestiture, we would need to be confident that it comprehensively remedied the SLC and had an acceptable risk profile. We currently have reservations with regard to the effectiveness of a partial divestiture (whether through a carve out or a reverse carve out) and would need to ensure that any remedy of this type had an acceptable risk profile, in particular in relation to:
 - (a) The significant risk inherent in replicating, transferring and integrating the various IT systems (including but not limited to the main ticketing platform, payments, finance and CRM) that are to be divested into a fully functional, viable and attractive business.
 - (b) The significant risk inherent in replicating, transferring and integrating other elements that might comprise an effective divestiture package, including but not limited to:
 - (i) Transfer of staff, who may be based in a number of different countries, to a new entity, in line with relevant labour laws, and with minimal risk to staff retention;

- (ii) Retention of key staff, including senior management, product engineers and developers, and marketing and customer relationship executives;
 - (iii) An established brand;
 - (iv) Transfer of contractual and non-contractual relationships with resellers, including reseller inventory, in line with relevant data protection laws;
 - (v) Contact lists and other data associated with buyers and resellers;
 - (vi) Money owed to resellers or customers;
 - (vii) Contracts and relationships with primary bodies/event holders;
 - (viii) Contracts and relationships with other key suppliers (eg payment providers, IT service providers).
- (c) Weakening the competitive capability of the divested business relating to the UK market, including the additional asset risks and ongoing uncertainty that may be associated with implementing any separation of StubHub or viagogo prior to a partial divestiture;
- (d) material costs and risks imposed on customers, such as those associated with the transfer of customers, including contractual commitments, between platforms, or those arising from the creation of separate platforms for the divested and retained businesses; and
- (e) the risks associated with any transitional service arrangements between the merged entity and a purchaser of the divested business.
20. Our initial view is that, in this case, there are substantial risks that any partial divestiture will not provide a comprehensive solution to the SLC we have provisionally found. Furthermore, the Parties would need to provide persuasive evidence that these risks can be eliminated or sufficiently mitigated, so as to provide a high degree of certainty that a partial divestiture would be an effective remedy.
21. Our current view is that a behavioural remedy is very unlikely to be an effective remedy to the SLC or any resulting adverse effect that it has provisionally identified. However, we will consider any behavioural remedies put forward as part of this consultation.

22. We will consider any other practicable remedies that the main parties, or any interested third parties, may propose that could be effective in addressing the SLC and/or any resulting adverse effects.
23. In determining an appropriate remedy, we will consider the extent to which different remedy options would be effective in remedying, mitigating or preventing the SLC or any resulting adverse effects that have been provisionally identified.
24. We will also consider whether a combination of measures is required to achieve a comprehensive solution – for example whether any behavioural remedies would be required in a supporting role to safeguard the effectiveness of any structural remedies. We will evaluate the impact of any such combination of measures on the SLC or any resulting adverse effects.

Issues to be considered in relation to a full or partial divestiture

25. In evaluating possible divestitures as a remedy to the provisional SLC it has found, we will consider the likelihood of achieving a successful divestiture and the associated risks. In reaching its view, we will have regard to the following critical elements of the design of divestiture remedies:

The scope of the divestiture package

26. To be effective in remedying the provisional SLC, any divestiture package would need to be appropriately configured to be attractive to potential purchasers and to enable the purchaser to operate effectively as an independent competitor.
27. At this stage, the divestiture options under consideration are:
 - (a) A full divestiture of StubHub or viagogo; and
 - (b) A partial divestiture of StubHub or viagogo.
28. We invite views on whether a full divestiture of StubHub or viagogo would be an effective remedy to the provisional SLC.
29. Regarding a partial divestiture of StubHub or viagogo, we invite views on the following issues of scope:
 - (a) Whether any partial divestiture of could be an effective remedy to the provisional SLC;
 - (b) the scope and configuration of the business and assets that would need to be divested in order for this remedy option to be effective;

- (c) the relative risks, merits and disadvantages of a possible carve-out or reverse carve-out option (as described above);
- (d) whether there are risks that the scope of the divestiture package may be too constrained or not appropriately configured to attract a suitable purchaser or may not allow a purchaser to operate as an effective competitor in the market. We would note our provisional finding that there are considerable scale advantages when competing in the relevant markets;
- (e) whether businesses and assets from both StubHub and viagogo could be included in the divestiture package ('mix-and-match'). The CMA has a preference for all the assets to be provided by one of the merger parties unless it can be demonstrated that there is no significant increase in risk from a 'mix-and-match' alternative;¹⁰
- (f) whether there are risks that a suitable purchaser is not available or that the merger parties will divest to a weak or otherwise inappropriate purchaser;
- (g) whether there are risks that the competitive capability of a divestiture package will deteriorate before completion of divestiture; and
- (h) how easy or difficult it would be to implement the steps and processes required to implement this remedy and the extent to which it would result in ongoing disruption to the StubHub or viagogo businesses and deterioration to their competitive capabilities.

Identification of a suitable purchaser

- 30. We will wish to be satisfied that a prospective purchaser:
 - (a) is independent of the main parties;
 - (b) has the necessary capability to compete;
 - (c) is committed to competing in the relevant market; and
 - (d) will not create further competition concerns.¹¹
- 31. We invite views on whether there are any specific factors to which we should pay particular regard in assessing purchaser suitability, e.g.:

¹⁰ [Merger Remedies: CMA87](#) (December 2018) paragraph 5.16

¹¹ [Merger Remedies: CMA87](#) (December 2018), paragraph 5.20 and 5.21.

- (a) Whether private equity or similar investment buyers would be suitable purchasers;
- (b) Whether a proven capability of operating a ticketing platform, whether in the UK or elsewhere, is essential or desirable; and
- (c) Whether a current UK presence and understanding of the UK market is essential or desirable.

Effective divestiture process

- 32. We invite views on the appropriate timescale for achieving a divestiture.
- 33. We will consider what, if any, procedural safeguards may be required to minimise the risks associated with this divestiture.
- 34. The CMA has the power to mandate an independent divestiture trustee to dispose of the divestiture package if:
 - (a) the merger parties fail to procure divestiture to a suitable purchaser within the initial divestiture period; or
 - (b) the CMA has reason to expect that the merger parties will not procure divestiture to a suitable purchaser within the initial divestiture period.
- 35. In unusual cases, the CMA may require that a divestiture trustee is appointed at the outset of the divestiture process. We invite views on whether the circumstances of this Merger necessitate such an approach.

Cost of remedies and proportionality

- 36. In order to be reasonable and proportionate, the CMA will seek to select the least costly remedy, or package of remedies, that it considers will be effective. The CMA will also seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects. Between two remedies that the CMA considers equally effective, it will choose that which imposes the least cost or restriction. In relation to completed mergers, the CMA will not normally take account of costs or losses that will be incurred by the merger parties as a result of a divestiture remedy.¹²

¹² [Merger Remedies: CMA87](#) (December 2018), paragraphs 3.8 and 3.9. This has been adopted by the CMA board.

37. We invite views on what costs are likely to arise in implementing each remedy option, and whether these costs are likely to differ between a divestiture involving StubHub and a divestiture involving viagogo.

Relevant customer benefits

38. In deciding the question of remedies, the CMA may have regard to the effects of any remedial action on any relevant customer benefits in relation to the creation of the relevant merger situation.¹³
39. Relevant customer benefits are limited by the Act to benefits to customers in the form of:
- (a) 'lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom ... or
 - (b) greater innovation in relation to such goods or services.'¹⁴
40. The Act provides that a benefit is only a relevant customer benefit if:
- (a) it accrues or may be expected to accrue to relevant customers within the UK within a reasonable period as a result of the creation of that situation; and
 - (b) it was, or is, unlikely to accrue without the creation of that situation or a similar lessening of competition.¹⁵
41. We welcome views on the nature of any relevant customer benefits and on the scale and likelihood of such benefits and the extent (if any) to which these are affected by the different remedy options we are considering.

Next steps

42. Interested parties are requested to provide any views in writing, including any practical alternative remedies they wish the Inquiry Group to consider, by 5pm on 5 November 2020 (see Note (i)).

¹³ Section 36(4) of the Act, see also [Merger Remedies: CMA87](#) (December 2018), paragraphs 3.15 and 3.16.

¹⁴Section 30(1)(a) of the Act, see also [Merger Remedies: CMA87](#) (December 2018), paragraph 3.17.

¹⁵ Section 30(3) of the Act, see also [Merger Remedies: CMA87](#) (December 2018), paragraph 3.19.

43. A copy of this notice will be posted on the CMA website [case page](#).

Stuart McIntosh
Group Chairman
22 October 2020

Note

- (i) This notice of possible actions to remedy, mitigate or prevent the SLC or any resulting adverse effects is made having regard to the Provisional Findings announced on 22 October 2020. The main parties have until 5pm on 12 November 2020 to respond to the Provisional Findings. The CMA's findings may alter in response to comments it receives on its Provisional Findings, in which case the CMA may consider other possible remedies, if appropriate.