5 November 2020

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

RESPONSE TO NOTICE OF POSSIBLE REMEDIES (NPR)

1. viagogo and StubHub (together, the **Parties**) provide the following response to the Notice of Possible Remedies published by the CMA on 22 October 2020. As a preliminary matter, the Parties note that they disagree strongly with the CMA's provisional conclusion that the merger will result in a substantial lessening of competition (**SLC**) and that any such 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 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*". In particular, the Parties consider that there is limited evidence before the CMA showing a material constraint from StubHub on viagogo and that, on the contrary, the evidence before the CMA shows that StubHub, in fact, exercises only a weak constraint on viagogo in the UK . In this context, the Parties note that the remedy need only replicate the limited existing constraint from StubHub on viagogo. The Parties will respond separately to the CMA's Provisional Findings.

2. Notwithstanding their position with respect to the CMA's substantive findings, the Parties are keen to fully and actively engage with the CMA to find a suitable remedy that addresses its concerns. As noted at paragraph 11 of the NPR, the CMA staff have had initial, without prejudice, discussions with viagogo regarding the possible scope and composition of a remedy. viagogo's remedy proposal encompasses the sale of the entirety of StubHub's international (i.e. ex-North America) business to a suitable purchaser. This response provides detail regarding viagogo's remedy proposal, addressing the issues and questions posed by the NPR and the CMA staff team (the Parties note that viagogo's remedy proposal was expanded following publication of the NPR, in light of the issues raised by the CMA).

3. At paragraph 12, the NPR states that "*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*". With respect to the former, the Parties submit that full divestiture of StubHub would be wholly unjustified and disproportionate. With respect to the latter, the Parties submit that, whilst the proposed divestiture of StubHub's international business clearly goes beyond what is necessary to remedy an SLC in the UK, by creating a secondary ticketing competitor with activity not just in the UK but the rest of Europe, Latin American and Asia, it removes any possible uncertainty about the effectiveness of the remedy and comprehensively addresses the CMA's concerns.

A. Requiring full divestiture of StubHub raises effectiveness concerns and would be disproportionate

4. Paragraph 13 of the NPR states 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.*"

5. As the Merger was effected through an acquisition by viagogo of StubHub, the Parties address the CMA's points by reference to a requirement to divest fully the acquired business, namely StubHub.

6. The Parties submit that full divestiture cannot be assumed to be an effective remedy and would, in any event, be disproportionate.

7. As set out in the NPR, the CMA's Remedies Guidance provides that CMA "*will seek remedies that are effective in addressing the SLC and its resulting adverse effects and will then select the least costly and intrusive remedy that it considers to be effective. The CMA will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects*".[1]

8. The relevant elements of the CMA's assessment can be summarized in the following extracts from paragraphs 3.5 and 3.6 of the Guidance:
   (a) *Impact on SLC and resulting adverse effects … Restoring this process of rivalry through structural remedies, such as divestitures, which re-establish the structure of the market expected in the absence of the merger, should be expected to address the adverse effects at source.*
   (b) *….*
   (c) *Practicality … The practicality of any remedy is likely to be reduced if elaborate and intrusive monitoring and compliance programmes are required.*
   (d) *Acceptable risk profile. The effect of any remedy is always likely to be uncertain to some degree … the CMA will seek remedies that have a high degree of certainty of achieving their intended effect*.

   Having decided which of the remedy options would be effective in addressing the SLC and resulting adverse effects, the CMA will then consider the costs of those remedies. In order to be reasonable and proportionate, the CMA will seek to select the least costly remedy, or package of remedies, of those remedy options that it considers will be effective … The CMA will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects.

9. For the reasons set out below, a full divestiture of StubHub, which would involve the divestiture of the entirety of StubHub's operations including those in North America, would not meet the above conditions.

   <u>Full divestiture cannot be assumed to be an effective remedy</u>.

10. Paragraph 3.35 of the CMA's Remedies Guidance states that "*full prohibition of an anticipated merger is an effective remedy as it necessarily maintains the competitive structure of a market that would have otherwise been changed by the merger*". In the NPR, the CMA appears to assume uncritically that the same would hold in this case if viagogo were to sell the entire StubHub business to a third party. However, this assumption is incorrect for the following reasons.

11. As the CMA is aware, StubHub's operations are almost exclusively focused on the North American market, with [redacted]% of its business being U.S. based. If viagogo were to sell the entirety of StubHub, it would therefore be selling a predominantly U.S. business. Whilst the immediate effect of a full divestiture would be that a third-party would take over StubHub's operations in the UK (and thus its market share/market position), the CMA cannot exclude with any degree of certainty that a purchaser would prefer to devote its future commercial efforts more on running the [redacted]% U.S. portion of its

1 CMA Remedies Guidance, para 3.5.

business than it would devote to the UK.[2] Indeed, ensuring otherwise would necessitate imposing and monitoring impractical behavioural commitments on the part of the purchaser with respect to its future business conduct in the UK. This would raise separate issues of feasibility, practicality and certainty. For these reasons, the CMA cannot assume with certainty that full divestiture would maintain effectively the competitive situation that existed pre-Merger in the UK.

Even if effective, full divestiture would be disproportionate.

12. In any event, even if divestiture of the whole of StubHub could be assumed to be effective, it would be entirely disproportionate. Paragraph 3.35 of the CMA's Remedies Guidance, referencing previous cases where the SLC did not encompass the entirety of the merging parties businesses, provides that "*partial rather than full prohibition may be appropriate, if feasible, where the merger parties carry out activities in a market or markets other than those that are expected to give rise to an SLC.*" In a case such as this, where the SLC (if found) relates to less than [redacted]% of the acquired business, full divestiture would clearly not fulfil the CMA's stated objective of seeking "*to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects*".

13. Further, whilst full divestiture would clearly be disproportionate as a matter of principle, the disproportionality of such a requirement is even more apparent in light of the fact that a partial divestiture remedy would provide a comprehensive and effective remedy, as discussed in the sections below.

B. The partial divestiture remedy proposed by viagogo would comprehensively address the SLC

14. Paragraph 14 of the NPR states that 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, i.e. 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. The Parties submit that the divestiture of StubHub's international business would not only "*create similar competitive conditions*" to the prevailing conditions of competition but would replicate effectively those conditions and, compared to a full divestiture, be certain of doing so beyond the immediate short term. It would thus comprehensively address the concerns identified by the CMA.

16. viagogo's divestiture proposal comprises the divestiture of the stock of Viagogo Luxembourg Holding Company S.à r.l. and the subsidiaries that sit within that holding company, which together cover the whole of StubHub's international primary and secondary ticketing business (the **International**

[2] In this respect, the Parties note that they believe this to be the case currently for StubHub: one reason it represents a weak competitive constraint in the UK is because it has paid limited attention to the UK operations, focusing instead on the US market which accounts for so much of its business.

Divestment Business).[3] The divestiture remedy will therefore cover of all of the assets and operations of StubHub that cover the purported relevant market, as required by paragraph 14 of the NPR.

17. In this respect, it is worth noting that viagogo submitted an initial proposal to the CMA that comprised the divestiture of StubHub's UK business, which would remove the overlap between the parties in the UK, allow a purchaser to compete successfully in the UK on an ongoing basis and provide an attractive foundation for growth. viagogo considered (and continues to consider) that a remedy with a UK-specific perimeter would amount to a comprehensive and effective remedy.

18. However, in light of initial concerns identified by the CMA, viagogo has enhanced its proposal by expanding it to encompass the additional assets and operations of StubHub's international business. In other words, viagogo's revised proposal amounts to undoing the merger with respect to everywhere outside North America (i.e. turning the acquisition from a global one into a North American one). This expansion puts the comprehensiveness of the remedy to address the SLC in the UK beyond doubt, for the following reasons:
    - The remedy provides the purchaser with the platforms and software currently used by StubHub to serve the UK market (and globally), thus leaving unchanged for the purchaser, in terms of technology, the pre-merger UK operations of StubHub;
    - The remedy provides the purchaser with the customer and transaction data relating to buyers and resellers registered with an international (i.e. ex-North America) postal address regardless of which entity they transacted with. Thus, the remedy provides the purchaser with the customer base and relationships that the international operations of StubHub, including in the UK, had pre-merger.
    - The remedy includes the use of the StubHub UK brand, thus replicating the brand used in the UK pre-merger, and goes even further by including the Ticketbis brand which was used historically in countries outside the US. Thus, to the extent that UK operations pre-merger benefitted from international sales, the proposed remedy provides a solid and established brand on which the purchaser can rely.
    - The remedy covers [redacted], thus allowing the purchaser to run the divestiture business in the UK to the same operational level as StubHub did pre-merger. These staffing levels have been designed specifically to avoid imposing additional costs and risks on the purchaser during this period of uncertainty. To the extent the purchaser wishes to take on the support and staffing required to operate the international divestment business at pre-Covid-19 levels, this option can be part of the remedy offer.

19. On the basis of the above, therefore, it is clear that the proposed remedy will replicate effectively the conditions of competition prevailing pre-merger. Further, as the remedy is focused on the UK (encompassing the whole of the StubHub international business in order to capture any international elements which currently benefit the UK business), this remedy is more capable than a full divestiture of attracting a purchaser that will focus on the UK market specifically, and is thus more likely to effectuate a longer-term replication of those competitive conditions.

[3] Under this proposal, only the StubHub Inc. entity and its subsidiaries will be retained by viagogo. These entities carry out the secondary ticketing business in the US and Canada. Additionally, there are two subsidiaries of StubHub Inc. outside of North America (one each in India and China). The China entity performs back-office functions (including developer support), whilst the India entity was merely a development centre for a US POS seller tool and is being wound down.

C. The partial divestiture remedy proposed by viagogo would be effective and would not give rise to composition or asset risks

20. Paragraph 5.3 of the Remedies Guidance identifies the composition risks of a divestiture as *"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*". At paragraph 19 of the NPR, the CMA sets out a number of "*reservations with regard to the effectiveness of a partial divestiture*", based on viagogo's initial proposal. The parties submit that by extending the proposed divestiture to cover StubHub's international business, the revised remedy proposal fully addresses the CMA's reservations and avoids composition risks, for the reasons set out below.

21. The first reservation identified by the CMA is 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*". viagogo's remedy proposal does not create such a risk. The divested international business will retain access to the same platforms it currently uses.

22. The current StubHub platform is in the process of being migrated to the Google cloud, in line with StubHub's pre-merger business plans. This migration will be complete before the time for the divestiture. An original version of the entire global platform (encompassing both software and data), from which data pertaining to the North America business will be removed, will be provided to the purchaser. Thus, not only does this remove the technological risks associated with transferring a portion of a platform stored on physical servers, but the StubHub international business already uses this platform and the associated software and technology systems. There are no additional IT systems sitting outside the StubHub international business that would need to be transferred into and integrated with the business.

23. The second reservation identified by the CMA is 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*. This risk does not arise, [redacted].
    - (ii) *Retention of key staff, including senior management, product engineers and developers, and marketing and customer relationship executives*. [redacted] viagogo notes that retention measures are already in place under the Interim Order imposed when the Merger was referred into Phase 2 and will remain until the divestiture is effected.

(iii) *An established brand*. The StubHub UK brand will be licenced to the purchaser for a period of three years, with an additional one-year blackout, providing the purchaser with an established brand in the UK on the basis of which to develop its business. In addition, the purchaser will receive the Ticketbis brand globally and Ticketbis global domains. Ticketbis operated as a successful business prior to its purchase by StubHub in 2016. As such, the remedy will also provide the purchaser with an established brand outside of the UK, with a long-standing domain history.

(iv) *Transfer of contractual and non-contractual relationships with resellers, including reseller inventory, in line with relevant data protection laws*. The purchaser will be provided with the customer and transaction data relating to resellers registered with an international postal address. At a technical level, this data does not need to be "transferred". As a full, original version of the StubHub platform will go with the International Divestment Business, the relevant customer and transaction data will be provided to the purchaser minus only North American data. Similarly, the data is already held on the Ticketbis platform which is owned by the International Divestment Business.

In terms of the legal relationships, [redacted]

(v) *Contact lists and other data associated with buyers and resellers*. These will go with the International Divestment Business. They do not need to be replicated or integrated prior to divestiture.

(vi) *Money owed to resellers or customers*. viagogo's remedy proposal includes covering the financial liability for money owed to resellers or customers (whether for cancelled events or otherwise). This risk therefore does not arise.

(vii) *Contracts and relationships with primary bodies/event holders*. All primary ticketing contracts and relationships used by the StubHub international business are owned by the International Divestment Business. They do not need to be replicated, transferred, or integrated prior to divestiture and, as a result, this risk does not arise.

(viii) *Contracts and relationships with other key suppliers (eg payment providers, IT service providers).* [redacted]. In practice, therefore, no risk to the purchaser arises in this respect.

24. The third reservation identified by the CMA is "*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". For all the reasons outlined above, there is no practical risk that the competitive capability of the divested business relating to the UK market will be weakened. The divestiture covers the entirety of StubHub's international business, which is a pre-existing, fully functional, viable entity, with its own assets, employees, real estate and contractual relationships. To the limited extent to which the international business relies on or is supported by contracts, IP rights or other assets[4] belonging to StubHub Inc. these will be transferred at viagogo's expense. In practical terms, therefore, no risk in this respect will fall to the purchaser.

25. To the extent that the reference to "asset risks" refers to the category of risk identified at paragraph 5.35 of the Remedies Guidance, namely "*risks that the competitive capability of a divestiture package will deteriorate before completion of the divestiture, for example, through the loss of customers or key members of staff*", it is clear that the proposed divestiture addresses any such risks. As set out above, [redacted] and retention measures are in place under the Interim Order and will continue up to the divestiture completes. Further, customer data for customers registered to an international address will be provided to the purchaser. Because this is based on customer registered address, there is no mechanism by which viagogo could attempt to prevent their transfer to the divestiture.

26. The CMA's fourth reservation relates to the "*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*". viagogo's remedy proposal will impose no costs or risks on customers, whether buyer or resellers. As the customer data is held by either StubHub Inc. (and a full, original version of the StubHub platform will be provided to the purchaser minus only North American data) or on the Ticketbis platform (which is owned by the International Divestment Business) there is no need to transfer this data between platforms. Similarly, whilst the divested and retained businesses will have separate platforms post-divestiture, this will be achieved by creating two identical platforms from the Google cloud, with the purchaser retaining the original version from which North America data will be removed. As data does not need to be transferred from elsewhere to that platform, there is no risk of customer data failing to be transferred across.

27. The CMA's final reservation relates to the "*risks associated with any transitional service arrangements between the merged entity and a purchaser of the divested business*". The Parties note that the CMA's Remedies Guidance provides at paragraph 5.25 for TSA arrangements where necessary, and thus there should be no assumption on the part of the CMA that such arrangement would automatically give rise to concerns. In any event, with respect to the proposed remedy, the exact scope of any transitional service arrangements will depend on the needs of the purchaser. viagogo is prepared to take a flexible approach to any TSA requirements, including by reference to the cost associated with such arrangements. Thus, to the extent there are risks with a TSA, these risks will essentially sit with viagogo rather than with the purchaser.

28. On the basis of the above, therefore, it is clear that viagogo's proposed remedy addresses the reservations raised by the CMA and that it does not raise risks that the scope of the divestiture

4 As noted above, the StubHub platform used by the international business does not need to be "transferred" prior to the divestiture in the sense normally understood by a carve-out divestiture, as an original of the platform will be created and directly provided to the purchaser.

package may be too constrained or not appropriately configured to either attract a suitable purchaser or to allow a purchaser to operate as an effective competitor in the market. On the contrary, the proposed remedy involves the divestiture of StubHub's entire international business, a fully-functional and viable business, which will allow the purchaser to compete effectively in the UK (and beyond).

D. <u>Assembly of the remedy package</u>

29. The NPR sets out at paragraph 16 that a partial divestiture could be carried out by means of a carve-out of the assets and operations to be divested or by divesting the whole and carving the assets and operations that are not part of the divestiture package and transferring them back to the merged business. At paragraph 17, the NPR states that the CMA's "*preliminary view is that the reverse carve-out option is preferable given it has a lower risk of not being effective*" and that it would involve most of the composition, asset and execution risks being borne by the Parties.

30. As noted above, the StubHub business is [redacted]% focused on North America. It would be neither practical nor reasonable to transfer the entirety of StubHub Inc. to a purchaser and then to "reverse carve out" [redacted]% of that transferred entity's business, particularly when the relevant operations all sit within the International Divestment Business. However, that does not mean that the remedy poses greater risks for the purchaser. As set out above, the divestiture will be achieved by means of a stock sale of the International Divestment Business, encompassing the whole of StubHub's international business. It is not a carve-out of disparate assets or operations that need to be amalgamated into a new whole – it is a simple sale involving a comprehensive and standalone business.

31. Further, to the extent that the divestiture involves a transfer or change (rather than the automatic consequence of a stock sale of the International Divestment Business), the risks of that transfer or change will sit with the merged entity, meaning that it will function as a "reverse carve-out" within the CMA's meaning. For example, with respect to the platform underpinning the secondary ticketing operations, a full original version of the platform will sit with the buyer. The only change to the buyer's platform is to remove unnecessary North America data. No positive changes need to be made to the platform for purposes of the international operations. viagogo will receive a clone of the platform. Similarly, to the limited extent to which the international business relies on or is supported by contracts, IP rights or other assets belonging to StubHub Inc. these will be transferred at viagogo's expense, thus placing any risk on the merged entity.

E. <u>Suitable purchaser</u>

32. At paragraph 30 of the NPR, the CMA states that it will need to be satisfied that the purchaser suitability criteria (as set out in paragraph 5.21 of the Remedies Guidance) are met. Aside from the requirement that the divestiture to the purchaser must remedy the SLC (see the sections above), these are that the 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*

33. For the reasons set out above, the proposed remedy offers a purchaser the entirety of StubHub's international business. This provides a full-functional, viable and standalone business which is capable of competing effectively in the UK and beyond. The mechanism by which the divestiture will be effected involves the transfer of any putative risk back onto the merged entity and viagogo will take a flexible approach to any discussions regarding the purchaser's needs. [redacted]

34. In light of the above, the Parties are confident that a purchaser who meets all of the above criteria will be found and approved.

35. In terms of the specific questions posed by the CMA at paragraph 31 of the NPR, given the comprehensive scope of the proposed remedy and the nature of the business to be divested, the Parties do not see any reason why an investment buyer would not be suitable, nor do they consider that secondary ticketing experience or UK-specific experience would be essential in order to allow a purchaser to run the divestment business successfully in the UK and beyond.

F. <u>Other issues raised in the NPR</u>

36. At paragraph 24 of the NPR, the CMA states that it "*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".* For the reasons outlined above, the Parties submit that the proposed divestiture provides a comprehensive and effective structural remedy to any SLC that the CMA may find. They do not consider that behavioural remedies would be necessary to safeguard the effectiveness of the remedy. However, to the extent that CMA considers otherwise, viagogo is happy to engage further with the CMA to address any final concerns.

37. The CMA lists a number of issues of scope with respect to the divestiture remedy at paragraph 29. The sections above provide the Parties' views on these issues. The only issue unaddressed by the above is the question of whether a "mix-and-match" remedy (i.e. combining businesses or assets from both parties) would be appropriate. As the proposed remedy comprises the entirety of StubHub's international business and is a fully-functional, viable standalone business, the Parties consider that a mix-and-match approach would not be appropriate or necessary.

38. With respect to the process questions raised at paragraphs 32 to 35 of the NPR, the Parties submit that there is no reason why a standard divestiture process would not be appropriate in the present case. The proposed divestiture package is fully-functional, viable and standalone. There is no risk of deterioration during the divestiture process, nor is there a risk that a suitable purchaser will not be found. The Parties note that a Monitoring Trustee is already in place under the Interim Order and are content for the Monitoring Trustee to remain in place until the divestiture is effected. Given the very minimal risks involved, there is no need to appoint a Divestiture Trustee at the outset of the process.

39. The Parties views on proportionality (sought at paragraph 37) are addressed above. As noted above at paragraph 5, since the Merger was effected through an acquisition by viagogo of StubHub, the Parties have considered the divestiture options with respect to the acquired business, namely StubHub.

40. Finally, the Parties make no submission relating to the issue of RCBs, noting however that, for the reasons set out in previous submissions (and as will be addressed in the response to the Provisional Findings), the structure and operation of the ticketing sector means that the Parties will continue to have the incentive to innovate to the benefit of customers in the UK.

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