

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

RESPONSE TO PROVISIONAL FINDINGS

A. Introduction

1. viagogo and StubHub (together, the **Parties**) provide the following response to the Provisional Findings (**PFs**) published by the CMA on 22 October 2020.
2. The Parties disagree strongly with the CMA's provisional conclusion that the merger will result in a substantial lessening of competition (**SLC**). In particular, the Parties consider that there is limited evidence before the CMA showing a material constraint from StubHub on viagogo. On the contrary, the evidence shows that StubHub, in fact, exercises only a weak constraint on viagogo in the UK and that viagogo competes with other ticketing channels in order to bring in liquidity currently served by those other channels.
3. Further, the CMA has not properly examined or provided any evidence to support its conclusion that the purported SLC would result in an increase in fees or deterioration of service to customers (i.e. whether any of the theories of harm it lists are actually likely to occur), relying instead on assumption and inference, based on an incorrect view of the constraints under which viagogo operates. As the evidence shows, the actual constraint exercised by other ticketing channels means that the Parties would have neither the incentive nor the ability to engage in conduct giving rise to such effects post-merger.
4. As detailed in the sections below, the CMA's case, as set out in the PFs, suffers from a number of key deficiencies:
5. First, the CMA has failed to carry out a proper analysis of competition in respect of secondary ticketing, including by ignoring the extent to which constraints on the buyer side impact the seller side, to reach the improper conclusion that viagogo is constrained to a significant degree by StubHub. A proper analysis of the evidence shows that:
 - a) Resellers multi-home whilst buyers single-home, demonstrating that resellers use the platforms as complements (rather than substitutes). The PFs do not point to any evidence that demonstrates otherwise and relies heavily on unsubstantiated arguments. Further, the CMA's general reliance on the reported views of a limited number of resellers is insufficiently robust.
 - b) Whilst buyers may consider the Parties to be substitutes, the extent to which they do so is very limited. This is supported by evidence of the impact of viagogo's suspension from Google Adwords and the Parties' respective customer acquisition models, neither of which have been properly assessed by the CMA.
6. Second, the CMA fundamentally misunderstands the competitive constraint under which viagogo actually operates, as it has taken an overly narrow focus on competition between the Parties for current customers and has ignored the need to compete with other ticketing channels in order to bring in liquidity currently served by those other channels. The evidence in this respect clearly shows that competition from other sources, rather than StubHub, is the binding constraint on viagogo.

7. Third, the CMA's conclusions with respect to its theories of harm rely on unsupported assumptions of harm. In particular, the PFs consistently conflate the fact that StubHub is a competitor or an "alternative" to viagogo with the concept of viagogo and StubHub being closest competitors with the existence of an SLC. From an economic and legal point of view, the mere fact of being a competitor or an alternative (or even the closest competitor) is not sufficient to show that the merger would result in a significant loss of competition and lead to an increase in price or reduction in service.
8. Underpinning many of the above deficiencies are shortcomings in the CMA's approach to providing the Parties with access to the (limited) evidence on which it relies, making it impossible for the Parties to test that evidence. These shortcomings are also addressed below.

B. A proper analysis of the evidence shows that viagogo and StubHub are not close competitors

9. In their response to the CMA's working papers (provided in advance of the PFs), the Parties provided arguments and evidence showing that the CMA had failed to properly analyse the closeness of competition between viagogo and StubHub. Whilst purporting to address the Parties' submissions, the PFs continue to fail to carry out the requisite analysis, as set out below.

(i) *The extent to which buyers single-home means that the viagogo and StubHub platforms are complements, rather than substitutes, for resellers.*

10. The CMA argues that the Parties are close competitors because "*a significant proportion of the largest resellers use both Parties' platforms in a year and the degree to which they do so is substantial*".¹ The PFs continue to erroneously infer that because viagogo and StubHub are used by resellers to sell tickets to the same events, this suggests that the Parties' platforms are used as alternative and substitute channels.²
11. The CMA believes that seller multi-homing is very significant and that even the estimated multi-homing may be a lower bound on the competitive constraint between the Parties, given that some resellers may initially consider multi-homing but then go on to list on only one platform.³ The CMA views the extent of multi-homing as an indication of the alleged closeness of competition between the Parties. However, as the Parties made clear in response to the CMA's working papers, this inference is unfounded and contradicted by the very nature of competition in secondary ticketing and the economics of multi-sided platforms.
12. In this respect, the Parties raised three issues, which the CMA has not addressed. The CMA continues to misunderstand the basic economics of indirect network effects and two-sided platforms, responding to evidence that contradicts its position with flawed reasoning that is not supported by the facts:
 - First, customers on either side of a platform may multi-home because the platforms are either complements or substitutes, a distinction which the CMA has continually failed to examine, by not seeking to determine why resellers multi-home. Despite the Parties making this need clear in

¹ PFs, para. 7.87.

² PFs, Appendix D, para. 34.

³ PFs, para. 7.88

- their response to the working papers, the CMA does not appear to have taken any steps to engage with resellers on this issue.
- Second, consideration of the evidentiary value of multi-homing as an indicator of closeness of competition in the context of a two-sided platform, where the attractiveness of a platform will be dependent on both reseller and buyer participation, requires an assessment of *both sides of the platform*, which the CMA had failed to carry out. Understanding the buy-side of the platform is critical to understanding the competitive constraints on the Parties on both sides of the platform including on resellers.
 - Third, the homing behaviour of customers also reflects the extent of differentiation (horizontal and vertical) between the platforms and the costs of multi-homing.⁴
13. As explained by the Parties, an analysis of buyer behaviour shows that buyers almost entirely single-home. An analysis conducted by CRA, adopting the buy-side equivalent of the CMA's approach (i.e. analysing the proportion that have purchased tickets on both platforms in 2019), shows that:
- (a) Only 0-10% [REDACTED] of all viagogo buyers also used StubHub (0-10% [REDACTED] weighted by GMS and 0-10% [REDACTED] by number of tickets); and
 - (b) Only 0-10% [REDACTED] of all StubHub buyers also used viagogo (0-10% [REDACTED] weighted by GTV or number of tickets).
14. Given that the vast majority of buyers single-home, sellers have an incentive to list on both platforms in order to access different pools of buyers on each platform. This means that (i) sellers view the viagogo and StubHub platforms as complementary, (ii) there is limited direct competition between them,⁵ and (iii) as such, competition is for buyers not sellers. The focus of competition on buyers is consistent with the customer acquisition strategies of the platforms (as outlined by the CMA in its Consumer Acquisition Analysis working paper) and the decline in viagogo sales during its suspension from Google Adwords.
15. The PFs purport to address the Parties' arguments and evidence with an attempt to understand buyer behaviour that is both illogical and unsupported by the facts. Specifically, the PFs claim that:⁶
- a) Because buyers purchase infrequently *"it is not surprising that the proportion of buyers purchasing tickets on both platforms in a given year is low"*. This is not supported by the facts. The evidence shows that buyers almost entirely single-home even over a much longer period. Less than 10% [REDACTED] of viagogo buyers that transacted in 2019 transacted on StubHub in the previous three years and less than 10% [REDACTED] transacted on StubHub at any point since StubHub launched.

⁴ Note that the Parties are largely undifferentiated horizontally, with the same basic platform functionality. This was a key finding of the Phase 1 Decision, which notes at para. 83 that there is a *"high degree of similarity between the Parties' service offerings"*. There is vertical differentiation as viagogo offers sellers access to more buyers and buyers access to more sellers (and thus greater competition between sellers and lower resale prices). There are minimal costs to a seller listing on more than one platform.

⁵ This is consistent with the CMA's approach to multi-sided platforms in other cases. For example, in *Just Eat/Hungryhouse*, the CMA noted that: where consumers single-home and [sellers] multi-home, platforms face little direct competition on the [seller] side, as they provide access to separate sets of consumers, paragraphs 6.56 to 6.63.

⁶ PFs, paras. 7.38-7.39 and Appendix D, para. 12.

- b) “[T]here is no evidence that the Parties serve separate pools of consumers”. The fact that buyers almost entirely single-home shows that this is exactly the case. The Parties are drawing in different buyers and, as a result, resellers are using their platforms as complements in order to access different buyers.
- c) Buyers are allegedly visiting both sites and thus there are not separate buyer pools. First, the Parties note that the comScore data on which the CMA relies for this conclusion actually shows the opposite: only “around 8% of viagogo’s monthly visitors also visited StubHub on average over the [2018-2020] period.”⁷ Importantly, and in any event, the comScore evidence must be interpreted with caution. The CMA had noted in its working papers that it “has limited understanding” of the comScore data, recognising that, as it is not actually based on direct measurement but instead relies to a large extent on comScore modelling, the results “will not be representative of the target population”, and cannot distinguish between buyer and sellers.⁸ The PFs no longer acknowledge the full extent of these limitations, instead placing unwarranted and significant weight on the results.
16. The CMA then makes a series of inconsistent and unsubstantiated statements that have little to no relevance to the issue. Specifically, the CMA notes that buyer single-homing “alone cannot tell [the CMA] anything about whether buyers would be willing to substitute between the two platforms” and that if competition was mainly for buyers the CMA would expect to see lower buyer fees to “lock-in” buyers.⁹ For the avoidance of doubt, it is clear there is competition between the platforms for buyers. The focus of the CMA’s assessment should be the *degree* of competition between them. Even if there was an incentive to “lock-in” buyers, this would exist regardless of whether competition is for buyers only or for both buyers and sellers. However, such an incentive clearly does not exist, as this is not how competition works in this sector. The CMA itself recognises that buyers tend to search for tickets for a specific event via Google. In other words, they are not drawn to a particular platform and any attempt to “lock [them] in” would make no commercial sense.
17. Stripping away the unsubstantiated reasoning on which the CMA relies, the only evidence that the CMA can point to are views from some of the 59 resellers (accounting for less than 1% of viagogo’s total resellers in a single year) that responded to the CMA’s questionnaire(s) during Phase 1 and Phase 2 (presumably the 537 resellers who did not respond to the CMA’s questions were either neutral or not concerned about the merger).¹⁰ As set out in section D(iii) below, there are significant concerns regarding the representativeness and robustness of such evidence.
18. As a result of the above, it is clear that, not only has the CMA failed to put forward any real basis for challenging the Parties’ evidence regarding single and multi-homing, but the CMA’s assessment fails to engage at all with the key point, which is that the extent of buyer single-homing inevitably means

⁷ PFs, Appendix F, para. 41. While the figure for StubHub is higher, this is entirely consistent with the vertical differentiation between the two platforms: the buyer will have more limited success finding tickets on StubHub given its size relative to viagogo and is entirely consistent with the *relative* multi-homing by sellers across the two platforms.

⁸ Consumer Acquisition Analysis Working Paper, slide 23.

⁹ PFs, para. 7.38.

¹⁰ See PFs, Appendix G, paras. 10 to 12, which state that the CMA contacted 86 resellers in Phase 1 (from which it received 24 replies) and 510 resellers in Phase 2 (from which it received 35 replies).

that resellers must list on both platforms in order to reach customers and that the two platforms are, in economic terms, complements.

(ii) The evidence from viagogo's Google Adwords suspension shows that the Parties are not close competitors

19. At the outset of Phase 2, the CMA carried out an analysis of viagogo's suspension from Google Adwords between July and November 2019 which purported to address the issues identified with the Parties' Phase 1 analysis (namely that the estimation *"focus[ed] on traffic [SimilarWeb] data rather than ticket sales"*, and that there may be other important factors affecting the changes seen in the data that need to be controlled for¹¹). Its analysis, set out in a working paper provided to the Parties before the PFs, concluded that viagogo lost significant sales as a result of the suspension, some of which went to StubHub (with no discernible effect in sports or theatre events)¹² but recognised that the analysis *"cannot account for all of viagogo's 'lost' sales"*, that it *"does not indicate a clear winner"* and that third-party competitors *"expressed concerns about the reliability of any analysis quantifying the impact of the suspension due to the lumpy nature of the market and the impossibility of carrying out a like-for-like comparison"*.¹³
20. In response to the working paper, CRA provided an econometric estimation of the diversion ratio building on the CMA's analysis and addressing the limitations therein. The analysis provides a natural extension of the CMA's analysis, as it is based on the Parties' sales data (revenue, GTV), but also includes additional control variables, in particular on ticket/inventory availability¹⁴ and marketing spend, as well as a number of additional sensitivity analyses.
21. The results of CRA's analysis are consistent with the CMA's working paper conclusion that only some of viagogo's sales were captured by StubHub: diversions account for only 18% of the total revenue lost by viagogo during the suspension (focusing only on music concerts, for which there are particularly good controls, estimated diversion remains at only 22%). This limited diversion suggests that the extent of competition between the Parties is limited, and is much less than an overly-narrowly defined market for online secondary ticketing platforms would suggest. These results are robust to different variables over which diversion is measured (revenue, GTV) and include different control variables.¹⁵
22. The PFs, at paragraph 7.129, state that *"the Parties' analyses produced quite different results and that the second, and most recent estimates, suggest that the diversion to StubHub was material, albeit less than would have been suggested by the Parties' respective market shares"*. This statement is patently

¹¹ Specifically, platforms-specific determinants such as marketing expenditures or time trends in the platforms' sales performances, and market-level factors such as the level of market supply or events activity.

¹² See viagogo Suspension from Google Adwords Working Paper, slide 22, where the CMA finds that *"SH's overall ticket sales in 2019 appear slightly higher than in 2018 during the time of the suspension"*.

¹³ viagogo Suspension from Google Adwords Working Paper, slides 9, 15 and 19.

¹⁴ This addresses a major limitation of the CMA analysis namely *"that the platforms' activity depends on what events are taking place and the inventory availability for resale prevent any like for like comparison"*. (viagogo Suspension from Google Adwords working paper, slide 15)

¹⁵ At the StubHub Main Party hearing, the Panel asked whether the [REDACTED]. The Parties confirm that there is no evidence of this. Furthermore, the sellers affected overwhelmingly multi-home.

incorrect. In fact, depending on the segment considered, the proportion of viagogo lost sales that StubHub captured was small, showing diversion rates of 18% to 22%. This clearly does not support a conclusion that diversions are material.

23. The CMA's conclusion to the contrary is possible only because, in its response to the Parties' analysis, the CMA appears to put the emphasis on the extremity of the range of the robustness sensitivities to wrongly characterise StubHub as imposing a significant competitive constraint on viagogo: *"The extensive sensitivity analysis reported shows that CRA's diversion ratios could amount to 25-30%, depending on the specification of the model. In particular, the analysis delivers higher diversion ratios (25-30%) when the model does not control for marketing spend."*¹⁶
24. This is not representative of CRA's actual findings. Table 1 below sets out a full overview of the estimated diversion ratios in a neutral and comprehensive fashion. An objective reading is that StubHub recaptured only a limited proportion of the sales lost by viagogo during the Google suspension, with the central estimate being between 18 and 22%. As the table shows, the PF's seem to have simply focussed on the highest numbers, regardless of whether they are meaningful or more likely than the central estimates. This is plainly incorrect; one cannot selectively single out the highest estimates from a few specifications to support a preconceived view.

Table 1: Overview of estimated diversion – baseline and sensitivities

Specification category	Specification	Metric			
		Most relevant (revenue)		Less relevant (GTV)	
		Total	Concerts	Total	Concerts
Most relevant	Baseline				
Less relevant (sensitivities)	S1 on supply control				
	S2 on supply control				
	S1 on marketing spend				
	S2 on marketing spend				
	S3 on marketing spend				
Average of the above					
Even less relevant: stress tests removing relevant control variables	S1 excl. event tickets added				
	S2 excl. marketing spend				
	S3 excl. quarterly controls				
Average of the above					

Source: CRA Analysis of Parties' data.

25. The CMA also states that the results of CRA's analysis *"indicate that StubHub imposes a significant competitive constraint on viagogo, even if the robust quantification of that constraint is difficult in this*

¹⁶ PFs, Appendix E, para. 19.

context.”¹⁷ The first part of this statement is plainly incorrect for the reasons set out above. Further, the Parties strongly dispute the latter part. CRA has undertaken a significant number of sensitivities to its analysis, and in all of them, even in the most extreme and less relevant sensitivities that ignore important controls, diversions are below 30%. In this context the results are remarkably robust and highly consistent with the Parties’ view that StubHub does not place a significant constraint on viagogo.

26. At paragraphs 7.137 to 7.138, the PFs reference a further “graphical” analysis that the CMA carried out, looking at trends in sales and any changes in patterns around the time of the suspension, which it considers show that *“StubHub captured a material amount of the business lost by viagogo during the suspension period”*. However, there are significant flaws in the CMA’s new analysis:

- a) First, the CMA’s analysis is based on the number of tickets sold, rather than revenue. In contrast to revenue, tickets sold is a much poorer proxy for the Parties’ incentives to compete. Using revenue weights the tickets according to their importance to viagogo and StubHub, which is important, as the extent of the constraint from StubHub on viagogo will depend on the revenue that viagogo could lose to StubHub if it were to increase price. Using ticket sales cannot capture this effect, as one high value ticket could represent as much revenue as multiple low value tickets but will not be reflected in the data.

Indeed, in its working papers the CMA itself focussed on GTV, as opposed to the numbers of tickets sold. Therefore, not only do the PFs mischaracterise the Parties’ findings, they are highly selective in their representation of the CMA’s own findings.

- b) Second, the CMA’s analysis appears to misread the data it relies on. The analysis reviews the number of tickets sold by both Parties and plots them over time, finding that: *“during the suspension, and even a little before that, StubHub’s ticket sales (solid line) were generally higher than during the same months of 2018 (dotted line) and 2017 (dashed line)”*¹⁸ and that *“this result is consistent with StubHub capturing a material proportion of the sales lost by viagogo during the suspension”*.¹⁹

Even if one was to consider that the number of tickets sold was a good measure for diversion, the PF’s conclusion is not clearly supported by the graph on which it relies. Whilst 2019 did have slightly higher sales during the period, it should be noted that this increase in sales took place earlier, around May, with June’s sales already significantly above the previous year’s sales. This suggests that other factors prior to the Google Adwords suspension were likely to be driving the departure from the previous years. Given the variance in monthly sales it is certainly not possible for the CMA to directly attribute the change to viagogo’s suspension from Google Adwords.

¹⁷ CMA PFs, Appendix E, para. 25. *“both CRA Analysis 2 and our quantitative analysis provide a more meaningful indication of StubHub’s competitive constraint on viagogo than the estimated diversion ratios in the CRA first analysis and the results of CRA Analysis 2 indicate that StubHub imposes a significant competitive constraint on viagogo even if the robust quantification of that constraint is difficult in this context.”*

¹⁸ PFs, Appendix E, para. 59.

¹⁹ PFs, Appendix E, para. 60.

27. Finally, despite finding, at paragraph 7.130, that CRA's analysis cannot "*robustly identify the impact of the suspension on the activity of viagogo and of the other platforms, including StubHub*", the CMA levels only a limited number of critiques against the analysis, none of which withstand scrutiny.
- a) The principal critique is that the year 2019 was different from previous years in that it was "*characterised by fewer and lower-quality events than previous years*", and therefore the CMA considers that "*CRA's baseline results are likely to be unreliable.*"²⁰ The CMA provides no evidence for this statement beyond the citation of a document provided by viagogo in response to an RFI. The CMA appears to have misread the viagogo document, as, whilst it clearly references the importance of the quantity of events (something the CRA analysis controls for), nowhere does it mention the quality of events. Further, there is no economic evidence to suggest that 2019 was significantly different from previous years, and thus no evidence to imply a bias in the estimates. As such, there appears to be no basis for the CMA's concern.
 - b) The second critique is that "*to the extent CRA's modelling overestimates viagogo's and StubHub's level of marketing spend which would have occurred during the suspension, the model would underestimate the diversion between the Parties*".²¹ Nowhere does the CMA provide evidence of such a bias or the possibility that marketing spend has been overestimated. As such, this critique is entirely unfounded.
 - c) The third critique is that the sample size is too limited.²² However, three years of data should be considered reasonable to obtain robust results, as demonstrated by the remarkably limited variation of estimates found in the sensitivity analysis undertaken by CRA. It is noted that the same critique could be made equally of the CMA's own analysis, making it hard to see why a small sample size provides sufficient data points to conclude that StubHub is an important constraint but not to conclude that it is not.
28. In summary, the results of CRA's analysis are robust and consistent with the conclusions of the CMA in its Google Adwords suspension working paper, and with both of CRA's previous analyses. They show that only a limited portion of viagogo's sales were captured by StubHub. These findings support the view that the degree of competition between the Parties is, in fact, limited and that StubHub places only a small constraint on viagogo. A detailed rebuttal of the CMA's findings is provided at Annex A.
29. Finally, the Parties note that Appendix E references a number of statements made at the main party hearing with StubHub that indicate reasons why StubHub's performance marketing strategy, spend allocation and approach to search engine advertising contributed to its poor performance during the time of viagogo's suspension from Google Adwords.²³ The Parties submit that, rather than undermining the conclusions from the economic analysis, this evidence provides further reasoning and support for the conclusion that StubHub exercises only a limited constraint on viagogo. Whilst the StubHub management may express a view that the suspension was a "learning experience" and they could compete more strongly in the future, this does not mean that StubHub would have been able to capture a material portion of viagogo's lost sales, had it adapted its performance marketing

²⁰ PFs, Appendix E, para. 23.

²¹ PFs, Appendix E, para. 23.

²² PFs, Appendix E, para. 21

²³ PFs, Appendix E, paras. 31-33.

strategy. Indeed, a statement of abstract future potential such as this provides little to no evidential value.²⁴

(iii) The Parties' differentiated customer acquisition strategies show that they are not close competitors

30. At paragraphs 7.109 *et seq*, the CMA considers the Parties' customer acquisition strategies and, in particular, their use of paid search. The CMA focuses on the level of advertising spend carried out by the Parties compared to other secondary ticketing platforms and on the number of unique visitors to each platform (see paragraphs 7.116 and 7.117). As the Parties had already pointed out in the response to the working papers, this type of evidence does not point to material competition taking place between the Parties and certainly not to close competition, as it fails to take account of the Parties' different acquisition strategies and the fact that they acquire consumers through different channels. StubHub [REDACTED]. These different acquisition strategies mean that StubHub is not competing for the same consumers as viagogo.
31. The Parties highlighted that, to the extent that both undertake paid search activity, the evidence suggests that they have very different approaches: only [REDACTED] % of keywords bid on by viagogo each month are also bid on by StubHub.²⁵ In this respect, the Parties highlighted the recent *Hunter Douglas* case, in which the CMA outlined how it uses keyword overlaps to interpret closeness of competition: "*the extent to which [firms] bid on the same search words can, among other factors, inform on closeness of competition between the Parties, i.e. if two [firms] largely bid on the same search words, this may suggest that they are particularly close competitors, while if this is not the case, it may suggest the two [firms] may be more distance [sic] competitors*"²⁶ [emphasis added].
32. Applying the same logic to this case, it is clear that StubHub provides only a very limited competitive constraint on viagogo. Although a larger proportion of StubHub keywords are bid on by viagogo, the analysis takes no account of the type of keyword search or other parameters that would determine whether both Parties bid, in fact, for the same keyword. Specifically, the CMA fails to take full account of (i) match types and how this affects keyword overlap and (ii) that viagogo bids on a large volume of negative keywords, which mean that many of the potential matches of "closely related keywords" highlighted in the CMA's results will not, in fact, be matches at all.
33. The PFs fail to engage with this key flaw in its assessment. At paragraph 7.123, the CMA asserts that "*the small proportion of viagogo's keywords bid on by StubHub is therefore a reflection of the Parties' differing approaches and the different ticketing inventory available to buyers on the platforms, not evidence of a lack of competitive interaction. In any case, even if there was strong evidence of an asymmetric constraint between the Parties, this would still indicate closeness of competition and a likely loss of competition as a result of the merger.*" The CMA's theory of harm has been contorted into only considering whether viagogo is a constraint on StubHub in order to be able to conclude the Parties are close competitors. This fits the evidence around the conclusions rather analysing and

²⁴ The evidential value of the statements is further reduced by the failure of the CMA to adequately place them in context, namely that the statements were the results of being repeatedly asked by the CMA whether there was anything that StubHub could have done differently during the suspension.

²⁵ PFs, para 7.112

²⁶ See *Hunter Douglas/247 Home Furnishings Phase 2 merger Final Report*, September 2020, Annex E, paragraph 55.

drawing conclusions from the evidence. The key question in the case is whether StubHub constrains viagogo. The evidence provided by the CMA indicates this is not the case. Indeed, StubHub does not have campaigns for more than 90% [REDACTED] of viagogo's keywords even though it is free to create them.

34. The CMA goes on to assert that there was an average of [REDACTED] closely matching keywords across the Parties each month and that since viagogo and StubHub are competing head-to-head on these keywords, this indicates closeness of competition. The CMA's analysis in this respect misuses and misinterprets Google Ads data and cannot be relied on:

- a) First, as noted above, the CMA the CMA assumes with no evidence that "closely matching keywords" overlap. It has given no consideration to whether these keywords actually overlap, taking account, for example, of match type and negative keywords; the latter, in particular, would reduce the keyword overlap very significantly.
- b) Second, even if one assumes that keywords overlap (which one cannot), the CMA itself has noted that the top 50 keywords "*account for a large share of traffic to their platforms*".²⁷ An analysis of the top 50 keywords shows the overlap to be very small (less than [REDACTED]%) and demonstrates that the Parties are not competing closely for buyers. The CMA cannot assert on the one hand that the top 50 keywords are the most important (where there is virtually no overlap) then rely on an absolute number of [REDACTED] keywords to attempt to show closeness of competition (where in any event there is likely to be limited overlap, given the CMA's errors in interpreting the data²⁸).

C. The evidence shows that viagogo is constrained by a wider range of competitors than secondary ticketing platforms in general or StubHub in particular

35. As viagogo has consistently submitted throughout the CMA's review, the key to its growth is attracting liquidity (buyers and sellers) to the platform from outside secondary ticketing. In order to attract more liquidity, viagogo must remain (and be increasingly) attractive to these sources of liquidity. With greater liquidity, viagogo has higher conversion rates, greater ticket volumes, and higher revenues. These benefits and incentives to grow volumes are known as the "liquidity flywheel" and are central to viagogo's strategy.²⁹ The CMA's analysis, however, fails to take due account of the importance of liquidity and its role as a constraint on viagogo.

(i) Sources of liquidity outside secondary ticketing platforms are the binding constraint on viagogo, not StubHub

36. In the Parties' response to the working papers, they highlighted the CMA's failure to take due account of the evidence showing that StubHub does not represent an important source of additional liquidity in the UK. To demonstrate this, CRA analysed whether customers (both sellers and buyers) new to viagogo were previously on the StubHub platform (and *vice versa*). CRA has cross-referenced viagogo's

²⁷ PFs, para. 7.124.

²⁸ It is unclear if the CMA has the requisite expertise in digital marketing to understand how to properly interpret Google Ads data. As a result, the data has been consistently misused and misinterpreted by the CMA. Given its limitations in this respect, the CMA cannot safely rely on its interpretation on the data for its analysis and conclusions.

²⁹ See Annex 16 to the merger Notice, slide 11.

new customers since 2018 against StubHub's complete UK historical customer list (back to its launch) to determine whether viagogo's new customers ever used StubHub. CRA then conducted the same exercise with respect to StubHub new customers.³⁰ This analysis shows that StubHub is a negligible source of liquidity for viagogo:

- a) The vast majority of new viagogo customers have never been on StubHub: Since 2018, only 0-5% of new buyers and only 5-10% of new sellers had ever previously transacted on StubHub. This means that the overwhelming majority (more than 90%) of viagogo's new customers, which make up the bulk of its total customers, come from other sources (and not from StubHub).
- b) The StubHub figures are broadly similar: Only 15-20% of buyers and 15-20% of sellers, respectively, were previously active on viagogo. The higher rate on StubHub is to be expected and reflects the relative size of the two platforms: as viagogo is a substantially larger platform in the UK, it is more likely that a new customer will have previously been on viagogo.

37. In the context of customers migrating on to secondary platforms from other sources, and the "quality" of platforms increasing over time (where quality is measured by the number of buyers available for sellers and sellers/inventory available to buyers, as well as the mix and popularity of tickets offered), these "switch-in" rates provide diversion ratio estimates. The results show that the Parties place only a very limited competitive constraint on each other and, in particular, StubHub provides no material competitive constraint on viagogo.³¹

38. Further supporting this, viagogo undertook a brief survey of new buyers in 2019, which asked buyers where they made their last ticket purchase prior to first using viagogo. The results show that only a very limited proportion of buyers that responded (1%) had previously used StubHub. Instead, more customers had made their previous purchase from Ticketmaster (35%), AXS Tickets, Eventbrite and See Tickets. Indeed, more buyers had purchased a ticket last using Facebook (2%) than StubHub.³²

39. The PFs acknowledge the importance of liquidity to the Parties. However, at paragraph 7.24, the CMA concludes that "*any loss of competition following the merger would therefore also reduce competition for these new sources of liquidity*", thereby assuming that new customers essentially choose only between StubHub or viagogo, and ignoring the fact that the most likely scenario is that the potential new customer will remain with their current option. This assumption is unwarranted, as it is the threat that the consumer will maintain the *status quo* that is likely to be the most binding and that constraint is unchanged by the merger.³³

40. The CMA's conclusion also fails to engage with the Parties' central argument, which is that it is the need for viagogo to be competitive *vis-à-vis* these other sources of liquidity that drives the way it

³⁰ Matching has been done only on email. As the CMA itself found, matching on additional fields does not significantly increase the extent of matched customers. Only UK-based customers are considered for analysis of both platforms. New customers are defined as those that registered and transacted after 2017.

³¹ In this context, the higher (although still limited) diversion from StubHub to viagogo is expected given viagogo's much larger size.

³² The response rate of this online survey of new customers was below the 5% threshold typically applied by the CMA. The results are therefore used here as an illustration to corroborate and supplement other analysis and evidence. A full results table is provided as an appendix to Annex 1.

³³ In this way, the CMA's conclusion is based on a standard binary fallacy – an assumption that the only two possibilities for consumers is to choose between the parties.

competes for customers and whether it makes any changes to its offering. Thus, viagogo expends its efforts on building a platform that offers an easy, convenient, and trustworthy method of buying and selling tickets in order to attract customers who are less familiar with ticket reselling and online platforms. Similarly, for those customers that use other online channels, viagogo aims to offer better pricing and service. For example, viagogo does not offer a guarantee that buyers will receive the tickets they paid for in time for the event and that sellers will be paid for their sales in order to compete more closely with StubHub, but in order to be attractive to customers who might otherwise use an alternative online channel to sell or source tickets (i.e. in order to compete with those other online channels).

41. The fact that viagogo is constrained by outside channels more than StubHub is clear from the fact that the PFs provide no evidence at all that viagogo has altered its competitive offering in response to actions by StubHub.³⁴ On the contrary, whilst the CMA recognises that there were few changes in viagogo's seller fees in the period 2018 to 2020 (see PFs paragraph 7.99), it fails to recognise that

██████████³⁵ Thus, the CMA's conclusion at paragraph 7.79 that "*it therefore seems to us that when viagogo tests its parameter setting in the market (examples include adjusting payment terms or suggesting resale ticket pricing to resellers, although it is also applicable to other parameters such as fee levels) ... it is very likely that the impact in the market (and on viagogo's business) reflects the close competitive presence of StubHub in the market*" is entirely unwarranted.

42. This is clear from the evidence provided at viagogo's main party hearing, which the CMA quoted at paragraph 7.78 of the PFs, whilst ignoring the plain meaning of the words used:

"It is obvious that we compete with StubHub in the market and with respect to the offering. But what I am saying is, it is not a constraint on our decision-making at all, and there is a big difference between the two' [emphasis added].

(ii) Additional liquidity will have the effect of lowering prices for ticket buyers, casting further doubt on the reseller evidence relied on by the CMA

43. Attracting more liquidity to a platform also results in increased competition between sellers and enhances price discovery and transparency for buyers, which lowers the resale prices paid by buyers. In the Parties' response to the working papers, they provided an analysis conducted by CRA which shows that greater liquidity leads to a fall in the prices paid by buyers (when the number of listed tickets for a given event increases by 10%, ticket resale prices are estimated to be around 0-10% lower).
██████████
44. The CMA finds in the PFs that this is not consistent with the analysis that the CMA has carried out (see PFs paragraph 7.28 to 7.30). The Parties submit, however, that the CRA analysis offers a more accurate estimate of the relationship between price and liquidity because it controls for factors that are likely to impact price, unlike the CMA's analysis:

³⁴ Similarly, viagogo did not adjust its reseller fees when Ticketmaster withdrew from secondary ticketing in the UK. This is consistent with viagogo's focus being on competitors outside the CMA's very narrowly defined market.

³⁵ As set out in viagogo's response to question 11 of the S109 notice dated 11 July 2020.

- a) First, the CMA's analysis relies on a comparison of the extent to which tickets sold on the Parties' platforms have a mark-up over face value. As the Parties have consistently stated, ticket face values cannot be verified and rely on customer reporting. As a result, they are not relied on by the Parties in the ordinary course of business and cannot be considered robust enough to rely on here.
 - b) Second, the CMA has made no attempt to control for different time periods, different events or different seating. As such, differences in prices are likely to simply reflect mix differences. This is evident from the fact that when the CMA controls for events, their results change drastically, with the median mark-up falling by almost a half for viagogo (from █% to █%) and increasing from █% to █% for StubHub. These changes are likely to be a reflection of the lack of controls in the CMA's analysis. We note that these issues are not present in the Parties' analysis which controlled not only for time effects, but also for event mix effects and the potential for different ticket qualities. In this respect the quality of controls, as well as the extensive robustness testing of the results, suggest that the CRA analysis is likely to be significantly more reliable than the simple price comparisons cited by the CMA.
45. At paragraph 7.31, the PFs argue that because CRA's analysis only looks at viagogo's platform, it does not model the merger effect of combining the Parties' platforms. This appears to miss the point of the analysis. The very fact that CRA's analysis holds the platform constant, rather than attempting to make cross platform comparisons, makes the analysis more reliable. Unlike the CMA's analysis of price differences between platforms, CRA's analysis isolates the impact of different platforms, and shows that more volumes will result in lower ticket prices. The Parties do not dispute the fact that any loss of competition may have a countervailing effect, and the analysis was not intended to model a full merger impact. Rather, the point is a simple one, namely that increased volume results in increased liquidity and therefore lower prices. This is a consequence that the PFs have entirely ignored.
46. Finally, at paragraph 7.32, the CMA argues that it is not sufficient to just look at the existence of the impact of new liquidity on prices, but the source of the new liquidity, as liquidity coming from some sources could potentially result in higher prices than liquidity coming from other sources. The assessment here amounts to nothing more than pure speculation, unsupported by any evidence. For example, paragraph 7.32(c) speculates that if additional listings come from other online channels, this is likely to come from occasional or fan resellers, rather than professional sellers, which could be expected to result in higher resale prices. There is no basis for such speculation – it would be equally logical to speculate that consumers would charge lower prices than professional sellers who are seeking to profit from the resale as a matter of course. Similarly, the speculation at paragraph 7.32(d) that additional listings coming from a higher proportion of primary tickets, would likely increase average ticket prices (as fewer end users/fans pay the lower primary prices than would have been the case) is asserted without evidence to ground it. Plainly, whilst the CMA is entitled to pursue whatever avenues of investigation it considers appropriate in its consideration of whether an SLC is likely to occur, it cannot simply assert unevidenced and speculative concerns as the basis for its findings.
47. The fact that the Parties' analysis provides a better and more robust estimate of whether prices for buyers are likely to fall with increased liquidity is key because, as the Parties noted in their response to the working papers, this reduction in prices provides a reason why it can be expected that some resellers will raise objections to the merger: greater competition between sellers, and greater buyer price discovery and transparency will lead to worse outcomes for sellers (to the benefit of buyers).

This is exemplified by evidence provided in the working papers, quoting a reseller stating that “*stubhub [sic] is terrible for selling on and so if those sellers move to viagogo then there will be more competition within sellers, which will therefore decrease prices for buyers*”.³⁶

48. The CMA’s failure to acknowledge this casts further doubt on the CMA’s conclusions throughout the PFs, given the extent to which they depend on the negative responses of a limited number of resellers.

(iii) The CMA’s focus on structural indicators significantly overestimates the constraint from StubHub on viagogo

49. At paragraphs 7.56 *et seq*, the CMA focuses on a number of “structural indicators” to inform its conclusions regarding the closeness of competition between viagogo and StubHub and underpin its conclusions on the existence of an SLC. For the reasons set out below, these structural indicators are significantly overstated. On a proper review, the evidence does not support the CMA’s conclusions.
50. The first structural indicator is “*the Parties’ market shares and those of other secondary ticketing platforms*”. For the reasons set out above and discussed in the Parties’ previous submissions, this is predicated on a narrow market definition which is unsupported by the evidence showing the wider constraints under which the Parties operate.
51. The second structural indicator is “*the relative size and growth of the Parties’ platforms in recent years*”. Here, the CMA ignores the evidence that StubHub’s growth is no more than around █% per annum in the UK over last four years, compared to an average of █% per annum for viagogo during the same period. In the context of a growing market, it is clear that StubHub’s growth rate poses no threat to viagogo whatsoever. Further, the CMA has provided no evidence to suggest that StubHub’s growth rate is materially greater than that of Ticketmaster Resale, Facebook, Twitter or Gigsberg. Finally, the CMA’s findings ignore the fact that it cannot point to any evidence of viagogo changing its behaviour because of StubHub or otherwise considering StubHub to be a competitive threat (indeed, as set out above, it has ignored explicit statements to the contrary).
52. The final structural indicator is “*the types of events for which tickets are listed for sale on the Parties’ platforms*”. As the CMA itself recognises at paragraph 7.65, there is a significant difference in the focus of the Parties, with StubHub sales being almost █ sport, █ live music and viagogo’s sales being almost █ live music and █ sport. Further, with respect to sport, there is a significant different focus, as StubHub generates a material proportion of its activity from listing tickets for specific events which viagogo does not cover and for which the parties do not compete. The CMA chooses to ignore the difference in the Parties’ focus, relying in particular on what appears to be a very limited selection of general statements from resellers that they consider the Parties to be alternatives and, ignoring the detail of its own findings at paragraph 17 of Appendix E, asserting that multi-homing somehow reduces the importance of this differentiation. On the contrary, as set out above, whilst resellers mainly multi-home, buyers mostly single-home. This indicates that buyers choose to visit the Parties’ sites to find tickets for different types of events and that resellers consider the Parties’ platforms to be complements, as they must list on both to reach these different buyers.

³⁶ Reseller Evidence Working Paper, slide 34.

53. As such, it is clear that the “structural indicators” do not support the CMA’s conclusions as to the closeness of competition between StubHub and viagogo, the extent of the constraint from the former on the latter, or the existence of an SLC.

(iv) The CMA’s consideration of dynamic pricing is incorrect and leads it to underplay materially the constraint from primary ticketing

54. A key element of the constraint from primary ticketing is the increasing use of dynamic pricing. The CMA’s continued dismissal of this constraint, partly due to the difference in ticket price and period of sale, fundamentally misunderstands the purpose of dynamic pricing. The primary supplier will vary its pricing and release tickets in response to demand with the intention of capturing the value obtained by the secondary marketplace reseller for itself (the commercial incentive to do so should be self-evident, as Ticketmaster has restructured its secondary ticketing in recent years to better allow it to capture this value), blurring the lines between its own primary and resale offerings (purchases from Ticketmaster and Ticketmaster Resale are presented alongside each other, fully integrated on the same platform with the resale prices being adjusted by Ticketmaster to match dynamically priced primary tickets).

55. The CMA’s use of the Parties’ data to compare primary (face value) and secondary pricing is disingenuous and ignores the submissions made by the Parties on this point. There is a difference between face value and secondary resale prices because there is a time lag between when the reseller purchases the primary ticket and when it resells that ticket, meaning that purchase and resale are subject to different demand (and supply) functions, and thus different pricing. As a result, the CMA is making a false comparison. To be meaningful, a comparison of pricing must be done at any given point in time, reflecting the extent to which the primary price has adjusted to take account of demand. To see the extent of dynamic and differential pricing – and the integrated ticketing offer of primary sellers – Figure 1 below is an excerpt from the tickets being sold by Ticketmaster to Lada Gaga in 2021. The first is a standard primary ticket (which can still be subject to dynamic pricing), alongside this are two resale tickets and four dynamically priced packages (these are not different types of tickets).³⁷

³⁷ It is unclear what evidence, if any, the CMA has obtained from Ticketmaster and AXS on this point.

Figure 1 – Ticketmaster Ticket Listings Lady Gaga London 2021

Seated Ticket	£151.25 each
Section 301 Row 7	Hot Ticket Package
	£261.00 each
Section 302 Row 7	Hot Ticket Package
	£261.00 each
Section 302 Row 8	Hot Ticket Package
	£261.00 each
Section 245 Row 3	Resale Tickets
	£302.13 each
Section 302 Row 4	Resale Tickets
	£302.13 each
Section 002 Row 4	Official Platinum Tickets
	£276.00 each
Section 407 Row 3	

56. Further, the CMA dismisses the constraint from primary ticketing as not being relevant for professional resellers.³⁸ This is clearly incorrect in the context of a two-sided platform. For buyers, dynamic pricing and integrated primary and resale platforms make primary ticketing a strong alternative. The evidence provided by the Parties shows buyers actively switching between using primary and secondary sellers. The CMA has provided no evidence on the buyer side to suggest that this is not the case. The constraints on the buyer side also provide a constraint on the seller side: the more buyers that divert to primary, the less attractive secondary marketplaces become for professional resellers and the fewer listings are made. For resellers, primary suppliers are making it increasingly difficult for a secondary marketplace to retain these listings, making secondary ticketing platforms less attractive relative to the primary and primary resale options.
57. In addition, while Ticketmaster presents its resale as a capped exchange, this does not reflect the actual prices set by resellers. For example, Figure 2 below shows two resale tickets listed as of 12 November 2020 for Lady Gaga and Diana Ross in London in June/July 2021. These show the face value and the resale price. In the first example, the resale price is 15% above the face value, in the second it is 18% above the face value. AXS explicitly allows for resale 10% above face value. The CMA misrepresents the Parties' data on resale price relative to face value to claim that 80-100% [REDACTED] and 60-80% [REDACTED] of tickets sold on viagogo and StubHub respectively are more than 20% above face value.³⁹ This is incorrect – indeed up to 20-40% [REDACTED] of transactions involve tickets that are sold below face value. As noted above at paragraph 44(a), data on face value is not reliable, as it is subject to wide margins of error and is unverified. Nonetheless, the CMA has continued to place significant weight on this.

³⁸ PFs, para. 6.12.

³⁹ PFs, para. 6.11.

Figure 2: Example Primary Resale Tickets

Lady Gaga
Fri Jul 30 2021 @ 19:00
Tottenham Hotspur Stadium,
London, UK

SECTION	ROW	SEATS
528	24	884 - 886

☒ Your seats will be together.

Seated Ticket
A max of 8 tickets per person and per household applies. Tickets in excess of 8 will be cancelled.

Resale Tickets 2
£86.32 each

Cost Breakdown

Tickets × 2	£172.64
Service Charge (inc VAT)	£25.88
Handling Fee	£2.50
Total to Pay	£201.02

Face value: £75.00 per ticket excluding fees

Diana Ross
Tue Jun 22 2021 @ 18:30
The O2 Arena, London, UK

SECTION	ROW	SEATS
BK 408	U	631 - 632

☒ Your seats will be together.

Full Price Ticket
Under 16s must be accompanied by an adult over 18. Seats located on Level 4 (Upper Tier, Upper Bowl) are not recommended for those who have a fear of heights. **Floor Seating is not raked and other customers might stand during the performance** **Letters of authorisation will not be accepted at the venue when collecting tickets for events at the O2. If collecting from the box office, the card holder must be present**. A max of 6 tickets per person and per household applies. Tickets in excess of 6 will be cancelled.

Resale Tickets 2
£76.97 each

Cost Breakdown

Tickets × 2	£153.94
Service Charge (inc VAT)	£23.08
Handling Fee	£2.50
Total to Pay	£179.52

Face value: £65.00 per ticket excluding fees

D. The CMA's findings rely on either a lack of evidence or on evidence that the Parties have been unable to properly test and address

58. In relation to key elements of the CMA's substantive analysis, the Parties have been unable to properly test and address the evidence on which the CMA relies.

(i) The CMA's findings on the Google Adwords suspension draw on a lack of evidence regarding the impact on other platforms

59. As set out above, the CMA's findings are in significant respects unsupported by evidence. Moreover, in key respects, the CMA draws inferences from a lack of evidence. It does so, for example, in relation to the impact of viagogo's suspension from Google Adwords on other secondary ticketing providers.

60. At paragraph 7.141, the PFs state that the CMA "did not find evidence that any other third Parties materially gained from the suspension, either in the quantitative evidence on their sales or in qualitative evidence provided by third parties and resellers. Therefore, we consider that the evidence from this event suggests that the Parties are each other's closest competitors, and close enough as competitors for StubHub to benefit from the event".

61. In this respect, the CMA has not provided the Parties or their advisers with access to the CMA's analysis of rival platforms so that they can test these conclusions. This is particularly problematic, given that it prevents the Parties from providing an analysis of the relative closeness of competition

from StubHub as compared to other competitors, in circumstances where the key support for the CMA's finding of an SLC is that StubHub is viagogo's closest competitor.

(ii) The CMA's dismissal of the constraint from primary ticketing relies on evidence unseen by the Parties or their advisers

62. As set out in the Parties' response to the working papers, and at section C(iv) above, the CMA's analysis fundamentally misunderstands the role of primary ticketing as a critical input to the sell-side of secondary ticketing. Primary ticketing sites, and content rights holders, are increasingly seeking to retain complete control over all ticketing sale and resale opportunities, by restricting ticket transferability and imposing sales exclusivity on ticket inventory. The constraint from primary ticketing on secondary ticketing is therefore two-fold:
- (a) Primary ticket sellers are increasingly competing with secondary resellers. The relevant question is not the extent to which the Parties are competing with Ticketmaster and other primary suppliers but whether primary sellers are increasingly competing with resellers of the Parties; and
 - (b) By limiting the inventory available of secondary marketplaces, primary ticketing is foreclosing access to the critical parameter that determines the quality of the Parties' offering: inventory. This reduces the attractiveness of secondary platforms to both buyers and sellers, meaning that secondary platforms have to work even harder to attract liquidity on to the platform to offer a viable and attractive product.
63. Primary suppliers such as Ticketmaster can and do reduce the quality and increase the relative price of secondary platforms. These strategies are designed to make the primary platforms more competitive vis-à-vis secondary platforms.
64. The Parties' response also explained that secondary ticketing platforms are obliged to spend considerable resources to try to address these barriers. In particular, the Parties highlighted that content rights holders already restrict the transferability and the resale of tickets for some events, and that dynamic pricing and restrictions on transferability reflect an increasingly important constraint, and one that will continue to grow in the coming years. To demonstrate this, viagogo has calculated the proportion of activity on its platform that is generated by events over which Ticketmaster has control (and for which it could feasibly restrict access). The results show that Ticketmaster-controlled events are responsible for an estimated 50-80% [REDACTED] of viagogo's total activity. Additionally, the proportion of viagogo revenue that is generated from events at venues owned or operated by AEG/AXS is 10-40% [REDACTED]. Thus, by restricting transferability, Ticketmaster and AEG are clearly protecting and expanding what should properly be viewed as their dominance over the ticketing supply chain.
65. The CMA, however, finds at paragraphs 6.14 and 6.15 that limited use is made of these strategies in the UK and places no weight on them. The basis on which this finding is made is entirely opaque, as can be seen from the following extracts from the PFs provided to the Parties' advisers.

Figure 3: Extracts from Provisional Findings

<p>6.14 The evidence we collected suggested that the ticketing practices referred to by the Parties cover only a very small proportion of overall primary ticket sales. For example, data on [3<]⁷⁰ use in the UK of a range of strategies that take account of buyer demand for its primary tickets indicate that, in 2019:</p> <p>(a) [3<] was applied to [3<]% of tickets, accounting for [3<]% of GTV;</p> <p>(b) [3<] was used in the sale of c. [3<]% of tickets, accounting for [3<] % of GTV;</p> <hr/> <p>⁷⁰ On a conservative basis, we focus on the proportion of tickets that are sold at more than 20% above face value to allow for sellers covering the cost of primary booking fees and delivery costs.</p> <p>⁷¹ See Appendix G for more details about the sample and the responses.</p> <p>⁷² [3<] of primary GTV.</p> <p>42</p>	<p>OFFICIAL</p> <p>(c) 'VIP tickets' accounted for [3<] % of ticket sales, accounting for [3<] % of GTV; and</p> <p>(d) Discounting (ie, sales below face value) was applied to [3<] % of ticket sales, accounting for [3<] % of GTV.</p> <p>6.15 The [3<] primary resellers also made relatively little use of these types of strategies in the UK.⁷¹</p> <p>(a) [3<] told us that it had not [3<]; while VIP tickets accounted for [3<]% of its primary ticket sales in 2019, accounting for % of GTV;⁷²</p> <p>(b) [3<] told us that dynamic pricing and VIP tickets made up [3<] of its primary ticket sales, with the latter tending to be driven by one promoter [3<].⁷³</p>
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66. Without access to the underlying evidence on which the CMA relies, the Parties cannot address the CMA's dismissal of this increasing constraint.

(iii) The CMA relies on reseller evidence that is partial and cannot be tested by the Parties

67. As noted above, the CMA relies throughout the PFs on the comments of resellers who responded to the CMA's request for information. For example, the CMA's assessment of the competitive constraint posed by other secondary ticketing platforms, other online channels, including social media, and offline channels relies heavily on such responses (see, for example, paragraph 7.182 of the PFs, which states "we asked resellers whether they viewed capped exchanges operated by the primary ticketing platforms as an alternative to the Parties. As set out in Appendix G, they were only mentioned by a small number of resellers as being an alternative and were not given a high average rating (2.5 out of 5)"; see also paragraph 7.165, 7.191, and 7.202).

68. As highlighted above at paragraph 17, the responses come from an extremely limited number of resellers (59), accounting for only [REDACTED] % of viagogo's customers. Further, whilst the CMA highlights in the PFs that "the largest resellers account for the majority of the Parties' sales", with those in the top

decile accounting for more than 70% [REDACTED] of GTV and that its analysis has “*focused on this top decile*”⁴⁰, the responses on which the CMA actually relies account for only 10-30% [REDACTED] of the Parties’ GTV⁴¹. Thus, far from gathering evidence that covers the top decile of the Parties’ GTV, the CMA’s evidence base encompasses less than 30% [REDACTED] of that reseller base based on GTV (and a tiny fraction of total resellers).

69. Additionally, the claim by the CMA that they “*can place weight on [reseller views] as indicative of wider views of resellers*”⁴² seems highly questionable in light of the fact that, as noted above at paragraph 17, 537 of the 596 resellers contacted did not respond to the CMA’s questions and are presumably therefore either neutral or not concerned about the merger.
70. Further, as pointed out in the response to the Working Papers, the CMA’s reliance on a small number of resellers raises concerns regarding the representativeness and comprehensiveness of the CMA’s reseller evidence.⁴³ In particular, whilst the CMA phrases its findings in terms of the responses to the CMA’s questionnaire, there is no indication of the number or proportion of resellers who responded fully or partially and, in the latter case, to which questions.
71. This is especially concerning in light of the CMA’s heavy reliance on reseller evidence for its conclusions. For example, as noted above, resellers appear to note only that StubHub is an “alternative”, which is not in dispute. However, the fact of its being an alternative does not come close to meeting the evidentiary standard of an SLC (or the conclusions made by the CMA that the Parties are “close competitors”), nor does the CMA’s reliance on a small number of selected quotes.
72. Further, neither the Parties nor their advisers were given access to the CMA’s questionnaire(s) or to the responses received. It is therefore impossible for the Parties to test whether the questions posed by the CMA were potentially liable to lead to false positive or false negative responses, whether they were likely to result in biased responses, or whether they could be misunderstood by the respondents. The Parties were similarly unable to test the accuracy of the CMA’s summary of the evidence provided through the responses.
73. In light of the very significant reliance placed by the CMA on reseller responses, this defect significantly undermines the CMA’s conclusions.

E. The CMA has provided no evidence that the purported theories of harm are likely to occur

74. At paragraphs 7.245 to 7.249 of the PFs, the CMA considers the Parties’ incentives to increase fees and worsen quality post-merger. Having concluded that the Parties “*are each other’s closest competitor for both resellers and for buyers, and that there will be very limited competitive constraints from other platforms and sales channels following the merger*”, the CMA concludes that the Parties

⁴⁰ PFs, para. 7.44.

⁴¹ PFs, Appendix G, para. 2.

⁴² PFs, Appendix G, para. 2.

⁴³ Note, in this respect, the CMA’s finding at paragraph 175 of the Reference Decision that viagogo had 320,000 unique resellers globally in 2018.

would have the incentive to increase fees or worsen terms or service following the merger relative to the counterfactual.⁴⁴

75. As an initial point, the Parties note that even if StubHub could properly be considered to be viagogo's closest competitor, this, in itself, is not sufficient to allow a conclusion that the loss of such constraint will result in the incentive to increase fees or worsen terms or service post-merger. The question, rather, is whether the magnitude of the constraint that StubHub provides on viagogo is sufficient that the loss of such constraint will lead to such an incentive. This question has not been considered by the CMA and nowhere has the CMA made an attempt to actually calculate the magnitude of this constraint.
76. Instead, the CMA relies on two paragraphs setting out a number of assertions and assumptions, none of which can properly support the CMA's theories of harm, as set out below:
- a) First, the CMA says that *"we have shown that there is some evidence of competition on fees and terms. For example, we have seen several examples of StubHub competing for resellers by offering better payment terms and reducing fees, although these have tended to be time-limited or event-specific"*. As set out in the Parties' previous submissions and above, the CMA has provided no evidence that viagogo's fees or terms have been varied due to competition from StubHub. In particular, the evidence regarding price adjustments by viagogo shows instead that [REDACTED], a constraint which will not be impacted by the merger.
 - b) Second, the CMA states that *"there are also wider elements of service that would be expected to worsen if resellers had no option but to use the Parties' platforms post-merger. Several of the Parties' resellers that we heard from had concerns that the merger would lead to worse service for buyers, while a number also explicitly predicted higher fees or worse terms for the Parties' resellers post-merger"*. This assertion is supported by nothing more than some statements by a number of resellers, which (as noted above), cannot be taken uncritically given the potential for the merger to result in reduced prices for such resellers.
 - c) The third assertion relied on by the CMA is that *"while we agree that the Parties benefit from attracting greater volumes of tickets to their sites, this does not mean that the merged firm will not have a changed incentive to worsen its terms or increase its fees to resellers and/or buyers as a result of the merger"*. It goes without saying that this broad assertion, for which no evidence is provided, cannot ground a finding that the Parties will, in fact, be likely to have such an incentive.
 - d) The additional assertion that *"mergers can result in long-term structural change in markets and the merged entity's incentives may change over time (eg because it may become harder to grow the market)"* is similarly incapable of grounding the CMA's purported theories of harm, not least because there is no indication that the CMA even considers that this theoretical change to incentives would be likely to occur within the medium-term.
 - e) Finally, the CMA concludes that *"while the need to attract liquidity may incentivise the platform to make a competitive offer to customers on both sides, a merger that substantially reduces the attractiveness of customers' outside options on both sides of the platform will weaken that*

⁴⁴ PFs, para. 7.247.

incentive and can be expected to lead to a worsening in the merged firm's offer". This is entirely unsupported by the evidence which, as set out above and in the Parties' previous submissions, shows that the outside options to customers are primarily other channels and that these will not be affected by the merger. Indeed, contrary to the CMA's conclusion, the Parties' incentives to make a competitive offer to buyers and resellers will remain unchanged post-merger due to the need to attract liquidity from those outside sources.

F. Conclusion

77. As the above sections demonstrate, the CMA's provisional findings are unsupported by the evidence and rely heavily on assertion and untested allegations. A proper review of the evidence shows that, far from being constrained to a significant degree by StubHub, viagogo is constrained by the wider ticketing market. Its incentives with respect to price and other terms are impacted by those wider constraints, which will not change post-merger. The merger will not, therefore, result in an SLC and will not lead to increased fees or worsened terms for either buyers or resellers.

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