

**DEROGATION LETTER  
IN RESPECT OF INITIAL ENFORCEMENT ORDERS ISSUED  
PURSUANT TO SECTION 72(2) ENTERPRISE ACT 2002**

**Consent under section 72(3C) of the Enterprise Act 2002 to certain actions for the purposes of the Initial Enforcement Order made by the Competition and Markets Authority (“CMA”) on 9 June 2020**

**Completed acquisition by Facebook, Inc. of Giphy, Inc.**

**Please note that [✂] indicates figures or text which have been deleted at the request of the parties for reasons of commercial confidentiality.**

Dear Mr. [✂],

We refer to your submissions dated 23 November 2020, 11 December 2020, 18 December 2020, 15 January 2021, 15 March 2021, 1 April 2021, 21 April 2021 and 13 May 2021 requesting that the CMA consent to derogations to the Initial Enforcement Order of 9 June 2020 (the “**Initial Order**”). Unless otherwise stated, the terms defined in the Initial Order have the same meaning in this letter. Further, in this letter:

**API** means application programming interface.

**Core Services** means Facebook, Instagram, WhatsApp, Facebook Messenger and Workplace.

**Core Services Subsidiaries** means Facebook, Inc, Facebook Ireland Limited, WhatsApp Inc, and WhatsApp Ireland Limited.

**GIF-related Activities** means any activities relating to the procurement, supply or development of GIF-related Content whether by or to Facebook, Giphy or any third party, including (without limitation) any operational, relationship management, strategic, development, technical or back-office activities or services.

**GIF-related Content** means non-text content created or shared by users via a social media, social network or messaging platform (including GIFs, stickers (including GIF stickers), emojis, video clips, images and other micro-expression assets).

**NPE Team** means the Facebook Inc, NPE Team which develops experimental apps, some of which are connected to the Giphy public API.

Under the Initial Order, save for written consent by the CMA, Facebook Inc., Tabby Acquisition Sub, Inc. (**Tabby Acquisition**), Facebook UK Limited (**Facebook UK**) and their subsidiaries (together **Facebook**) are required to hold separate the Facebook business from the business of Giphy, Inc. (**Giphy**) and refrain from taking any action

which might prejudice a reference under section 22 of the Act or impede the taking of any remedial action following such a reference.

After due consideration of your request for derogations from the Initial Order, based on the information received from you and in the particular circumstances of this case, the CMA consents to Facebook, Tabby Acquisition and Facebook UK carrying out the following actions, in respect of the specific paragraphs:

## 1. Paragraphs 5(c), 5(d), and 5(e) of the Initial Order

### *Facebook derogation request*

Further to the derogations granted by the CMA on 22 December 2020, 8 February 2021, 24 February 2021 and 16 March 2021, Facebook has sought CMA consent to limit the application of the above-mentioned provisions of the Initial Order so that they only apply to the procurement and supply of GIFs and stickers (thereby excluding unrelated activities within the Facebook business from the scope of the above-mentioned provisions).

Consistent with the previous derogations granted by the CMA in this case, and having regard to the legitimate precautionary purpose of the Initial Order and the information obtained so far during its investigation, the CMA has considered Facebook's derogation request based on a broader definition of actions which constitute GIF-related Activities.

Based on the information provided and representations made by Facebook, the CMA understands that:

- i. Facebook's GIF-related Activities are integrated within the Core Services and therefore cannot be easily ring-fenced;
- ii. All of the Core Services, including Facebook's searchable sticker stores available to users of the Facebook and Messenger apps (**Sticker Store**), are provided by one of the Core Services Subsidiaries;
- iii. Whilst GIF-related Content is an input into a number of the Core Services, this represents only a very small input to the Core Services;
- iv. Facebook does not have a separate GIF-related Content division, nor any personnel that are dedicated to GIF-related Activities, including back office support services which are shared across the Facebook business;
- v. Although individuals within Facebook's [redacted] are responsible for managing Facebook's relationships with third party GIF-related Content providers, they do not spend a majority of their time working on GIF-related Activities;
- vi. [redacted]
- vii. In addition in respect of the NPE Team, [redacted] and
- viii. Facebook's [redacted]

Facebook represents that limiting the application of the above-mentioned provisions of the Initial Order so that they only apply to Facebook's GIF-related Activities could not give rise to a risk of pre-emptive action.

### *Derogation*

On the basis of the information provided by Facebook and in the particular circumstances of this case as described in previous correspondence with Facebook, the CMA consents to a derogation to limit the application of paragraphs 5(c), 5(d), and 5(e) of the Initial Order, so that they only apply to Facebook's GIF-related Activities, strictly subject to the following exclusions:

- i. Facebook is not permitted to carry out any organisational or financial restructuring to the Facebook business which could negatively impact its GIF-related Activities;
- ii. Facebook is not permitted to dispose of any assets (tangible or intangible) of the Facebook business which could negatively impact its GIF-related Activities;
- iii. Facebook is not permitted to take any steps to degrade the APIs of the third-party GIF-related Content providers, or its Core Services in such a way that would result in the termination of, or a substantial change to, the APIs of the third-party GIF-related Content providers;

For the avoidance of doubt, this derogation does not affect the fact that, by virtue of the Initial Order:

- i. Facebook is not permitted to take any action which could degrade its Sticker Store;
- ii. Except in the ordinary course of business, Facebook is required at all times to maintain the supply of GIF-related Content, whether by Facebook, Giphy or any third party;
- iii. Except in the ordinary course of business, Facebook is not permitted to materially change its agreements with Giphy or any other third-party GIF-related Content provider;
- iv. Facebook is required to provide continued support to its GIF-related Activities (including financing, development, engineering, maintenance, integration, legal, compliance, etc) to ensure the maintenance and development of all GIF-related Activities, including its Sticker Store, in line with its pre-merger budget; and

The derogation is granted strictly on the basis that it will not result in any further integration of Giphy within the Facebook business (beyond that which had already occurred as at the commencement date of the Initial Order).

## **2. Paragraphs 5(i) and 5(k) of the Initial Order**

Facebook has sought CMA consent to limit the application of the above-mentioned provisions of the Initial Order so that they only apply to key staff engaged in Facebook's GIF-related Activities.

Based on the information provided, and representations made, by Facebook, the CMA understands that:

- a. Facebook does not have any personnel that are dedicated to GIF-related Activities, including back office support services which are shared across the Facebook business; and
- b. Although individuals within Facebook's [X] are responsible for managing Facebook's relationships with third party GIF-related Content providers, they do not spend a majority of their time working on GIF-related Activities.

On the basis of the information provided by Facebook and in the particular circumstances of this case as described in previous correspondence with Facebook, the CMA consents to a derogation to limit the application of paragraphs 5(i) and 5(k) of the Initial Order, so that they only apply to key staff engaged in GIF-related Activities.

This derogation is granted, strictly on the basis that it excludes all Facebook staff from the scope of the abovementioned provisions of the Initial Order, save for those staff who are key staff for the purposes of paragraphs 5(i) and 5(k) of the Initial Order and are:

- i. identified in Annex 1 to this derogation (which can be varied with the prior written consent of the CMA, including via email); and
- ii. in positions of executive or managerial responsibility and/or whose performance affects the viability of the Facebook business, and, are engaged in work that has a material impact on Facebook's GIF-related Activities (noting that such material impact may be the result, for example, of an operational, strategic or compliance role).

From the moment that a Facebook staff member has commenced work that has a material impact on GIF-related Activities, they will be treated as key staff for the purposes of the abovementioned provisions of the Initial Order and Facebook will promptly inform the CMA, who will add the employee and their direct manager to the list of key staff identified in Annex 1.

### **3. Paragraph 8 of the Initial Order**

Further to derogations 1 and 2 above, Facebook has sought CMA consent to limit its reporting obligations under paragraph 8 of the Initial Order so that it is only required to report on GIF-related Activities (thereby excluding non-GIF related Activities within the Facebook business from the scope of the reporting requirements under paragraph 8 of the IEO).

The CMA consents to a derogation to limit Facebook's reporting requirements pursuant to paragraph 8 of the Initial Order so that Facebook is no longer required to

report on those material developments that, as a result of the relevant derogations above, are now outside the scope of paragraphs 5(c), 5(d), 5(e), 5(i) and 5(k) of the Initial Order.

For the avoidance of doubt, the remainder of Facebook's reporting requirements under paragraph 8 of the IEO remain intact.

Yours sincerely,

**Richard Romney**

**Director, Mergers**

29 June 2021

## Annex 1 – key staff

