

COMPLETED ACQUISITION BY FACEBOOK, INC OF GIPHY, INC

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

Introduction

1. On 1 April 2021, the Competition and Markets Authority (**CMA**), in exercise of its duty under section 22(1) of the Enterprise Act 2002 (the **Act**), referred the completed acquisition by Facebook, Inc (**Facebook**) of GIPHY, Inc (**GIPHY**) (the **Merger**), for further investigation and report by a group of CMA panel members (the **Inquiry Group**).
2. The Merger completed on 15 May 2020. The CMA imposed an Initial Enforcement Order² (**IEO**) on 9 June 2020 requiring Facebook and GIPHY to remain independent during the inquiry to ensure that no action is taken pending final determination of the Reference, which might prejudice the Reference or impede the taking of any action by the CMA under Part 3 of the Act which might be justified by the CMA's decisions on the Reference.
3. In its provisional findings on the reference, notified to Facebook and GIPHY (the **Parties**) on 12 August 2021 (the **Provisional Findings Report**), the Inquiry Group, among other things, provisionally concluded that the Merger has resulted in the creation of a relevant merger situation, and that the creation of that situation has resulted or may be expected to result in a substantial lessening of competition (**SLC**):
 - (a) in the supply of display advertising in the UK due to horizontal unilateral effects arising from a loss of dynamic competition, and
 - (b) in the supply of social media services worldwide due to vertical effects resulting from input foreclosure.
4. Our analysis provisionally indicates that the SLCs identified have resulted or may be expected to result in adverse effects. For example, the Merged Entity would be under less pressure to compete and this would result in reduced choice, an increase in prices, deterioration in quality, deterioration in service

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

² [Initial Enforcement Order](#).

and/or loss of innovation compared to what would otherwise have been the case absent the Merger.

5. This Notice sets out the actions which we consider the Inquiry Group might take for the purpose of remedying the SLCs and/or any resulting adverse effects identified in the Provisional Findings Report.
6. We invite comments on possible remedies by **5:00pm on 25 August 2021**.³

Criteria

7. In deciding on a remedy, the CMA shall in particular have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to remedy the SLC and any adverse effects resulting from it.⁴
8. To this end, the CMA will seek remedies that are effective in addressing the SLC and its resulting adverse effects and will select the least costly and intrusive remedy that it considers to be effective.
9. The CMA will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects.⁵

Possible remedies on which views are sought

10. In merger inquiries, the CMA will generally prefer structural remedies, such as divestiture or prohibition, rather than behavioural remedies because:
 - (a) structural remedies are likely to deal with an SLC and its resulting adverse effects directly and comprehensively at source by restoring the rivalry that would be lost as a result of the merger;
 - (b) behavioural remedies may not have an effective impact on the SLC and its resulting adverse effects, and may create significant costly distortions in market outcomes; and
 - (c) structural remedies do not normally require ongoing monitoring and enforcement once implemented.⁶

³ Responses to the Notice of Possible Remedies are typically requested within 14 days of publication of the Notice (and in any event, no less than seven days) so that they can be considered before response hearings (CMA 2 Mergers: guidance on the CMA's jurisdiction and procedure, paragraph 13.1).

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

⁵ *Merger Remedies: CMA87* (December 2018), paragraph 3.3 and 3.4.

⁶ *Merger Remedies: CMA87* (December 2018), paragraph 3.46. This has been adopted by the CMA board.

11. At this stage, we have identified one potential structural remedy: requiring the full divestiture of GIPHY.
12. We consider that a full divestiture of GIPHY would be similar to a prohibition of the Merger as it would re-create a similar market structure to that which existed at the time of the Merger. We therefore take the preliminary view that, subject to implementation considerations, a full divestiture of GIPHY would represent a comprehensive and effective remedy to all aspects of the SLCs we have provisionally found, and consequently any resulting adverse effects. At this point we have not identified any smaller divestiture package that would be similarly effective.
13. Our current view is that a behavioural remedy is very unlikely to be an effective remedy to the SLCs or any resulting adverse effects that we have provisionally identified. However, we will consider any behavioural remedies put forward as part of this consultation.
14. We will consider any other practicable remedies that the Parties, or any interested third parties, may propose that could be effective in addressing the SLCs and/or any resulting adverse effects.
15. In determining an appropriate remedy, we will consider the extent to which different remedy options would be effective in remedying, mitigating or preventing the SLCs or any resulting adverse effects that have been provisionally identified.
16. We will also consider whether a combination of measures is required to achieve a comprehensive solution – for example whether any behavioural remedies would be required in a supporting role to safeguard the effectiveness of any structural remedies. We will evaluate the impact of any such combination of measures on the SLCs or any resulting adverse effects.

Issues to be considered in relation to a full divestiture of GIPHY

17. In evaluating the full divestiture of GIPHY as a remedy to the provisional SLCs we have found, we will consider the likelihood of achieving a successful divestiture and the associated risks. In reaching our view, we will have regard to the following critical elements of the design of divestiture remedies.

The scope of the divestiture package

18. To be effective in remedying the provisional SLC, any divestiture package would need to be appropriately configured to be attractive to potential purchasers and to enable the purchaser to operate effectively as an

independent competitor and supplier of GIFs, and to continue innovating and developing its products, including generating revenues through digital advertising.

19. We invite views on whether a full divestiture of GIPHY would be an effective remedy to address the provisional SLCs which we have identified.
20. The CMA's IEO is intended to preserve GIPHY's competitive independence until completion of our investigation. However, at the time when the IEO was imposed, GIPHY had already been largely integrated into Facebook's operations, and currently relies on Facebook for back-office and other functions. The majority of GIPHY's staff are now employed directly under employment contracts with Facebook. GIPHY's sales team has also been disbanded and its revenue-generating activities terminated. As a result, it does not currently generate any revenue.
21. It is our initial view that this integration and other steps should be reversed as part of a divestiture process, and that the divestiture package should have the requisite functions and capabilities to allow GIPHY to compete as a standalone business. In our initial view, the necessary reversal steps would include (but not be limited to):
 - (a) Reconstitution or re-creation of the GIPHY management team;
 - (b) Re-creation of GIPHY's sales and partnership functions;
 - (c) Ensuring GIPHY has sufficient numbers of key employees such as engineers and personnel responsible for GIPHY's creative functions, and that these employees have suitable retention incentives; and
 - (d) Ensuring that GIPHY's proprietary and licensed IT systems and applications, its library of GIFs and stickers, and the associated IP rights are included in the divestiture package.
22. We invite views on the composition of the divestiture package, whether there are additional GIPHY assets or functions that would be necessary to ensure an effective remedy, and whether additional Facebook assets (for example, back-office systems or personnel) should be included.
23. The CMA will consider using the full extent of its remedial powers to ensure that the divestiture package represents an effective stand-alone competitor and supplier of GIFs which will continue to innovate and develop its products, and seek to generate revenue through digital advertising.

Identification of a suitable purchaser

24. There may be a number of potential purchasers for the divestiture package. We will wish to be satisfied that a prospective purchaser:
- (a) is independent of the 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.⁷
25. We invite views on whether there are any specific factors to which we should pay particular regard in assessing purchaser suitability, eg:
- (a) Whether a proven capability of operating a GIF supply business or similar, is essential or desirable;
 - (b) Whether a purchaser should have particular attributes or credentials to allow it to overcome any risks associated with the composition of the divestiture package, including the need to provide GIPHY with a sufficient cash runway to be able to operate and re-establish its revenue-generating activities;
 - (c) Whether private equity or similar investment buyers would be suitable purchasers;
 - (d) Whether any particular purchasers (eg other GIF providers or social media platforms) might cause competition problems; and
 - (e) Whether there are any other factors that we should consider.

Effective divestiture process

26. We invite views on the appropriate timescale for achieving a divestiture.
27. We will consider what, if any, procedural safeguards may be required to minimise the risks associated with this divestiture. This may include options given to a purchaser regarding the composition of the divestiture package, the timing of the re-constitution of the GIPHY business set out in paragraph 21 above, and the role of the Monitoring Trustee in this re-constitution.

⁷ [Merger Remedies: CMA87](#) (December 2018), paragraph 5.20 and 5.21.

28. The CMA has the power to mandate an independent divestiture trustee to dispose of the divestiture package if:
- (a) the merger parties fail to procure divestiture to a suitable purchaser within the initial divestiture period; or
 - (b) the CMA has reason to expect that the merger parties will not procure divestiture to a suitable purchaser within the initial divestiture period.
29. In unusual cases, the CMA may require that a divestiture trustee is appointed at the outset of the divestiture process. We invite views on whether the circumstances of this Merger necessitate such an approach.

Cost of remedies and proportionality

30. In order to be reasonable and proportionate, the CMA will seek to select the least costly remedy, or package of remedies, that it considers will be effective. The CMA will also seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects. Between two remedies that the CMA considers equally effective, it will choose that which imposes the least cost or restriction. In relation to completed mergers, the CMA will not normally take account of costs or losses that will be incurred by the merger parties as a result of a divestiture remedy.⁸
31. We invite views on what, if any, relevant costs are likely to arise in implementing a full divestiture of GIPHY.

Relevant customer benefits

32. In deciding the question of remedies, the CMA may have regard to the effects of any remedial action on any relevant customer benefits in relation to the creation of the relevant merger situation.⁹
33. Relevant customer benefits are limited by the Act to benefits to customers in the form of:
- (a) 'lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom ... or
 - (b) greater innovation in relation to such goods or services.'¹⁰

⁸ [Merger Remedies: CMA87](#) (December 2018), paragraphs 3.8 and 3.9. This has been adopted by the CMA board.

⁹ Section 36(4) of the Act, see also [Merger Remedies: CMA87](#) (December 2018), paragraphs 3.15 and 3.16.

¹⁰Section 30(1)(a) of the Act, see also [Merger Remedies: CMA87](#) (December 2018), paragraph 3.17.

34. The Act provides that a benefit is only a relevant customer benefit if:
- (a) it accrues or may be expected to accrue to relevant customers within the UK within a reasonable period as a result of the creation of that situation; and
 - (b) it was, or is, unlikely to accrue without the creation of that situation or a similar lessening of competition.¹¹
35. We welcome views on the nature of any relevant customer benefits and on the scale and likelihood of such benefits and the extent (if any) to which these are affected by the different remedy options we are considering.

Next steps

36. Interested parties are requested to provide any views in writing, including any practical alternative remedies they wish the Inquiry Group to consider, by **5pm on 25 August 2021** (see Note (i)).
37. A copy of this notice will be posted on the CMA [case page](#).

Stuart McIntosh
Inquiry Group Chair

Note

- (i) This notice of possible actions to remedy, mitigate or prevent the SLC or any resulting adverse effects is made having regard to the Provisional Findings announced on 12 August 2021. The Parties have until 5pm on 2 September 2021 to respond to the Provisional Findings. The CMA's findings may alter in response to comments it receives on its Provisional Findings, in which case the CMA may consider other possible remedies, if appropriate.

¹¹ Section 30(3) of the Act, see also [Merger Remedies: CMA87](#) (December 2018), paragraph 3.19.