Comment to the Competition and Markets Authority
Regarding Facebook, Inc / Giphy, Inc merger inquiry

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The Competition and Markets Authority

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Thank you for allowing the opportunity to comment on the Competition and Markets Authority (CMA) investigation into Facebook's acquisition of Giphy. We represent the Consumer Center at the Taxpayers Protection Alliance (TPA), based in Washington, DC. TPA is a non-profit, non-partisan organization dedicated to educating the public through the research, analysis, and dissemination of information on the government's effects on the economy.

It is inevitable in the fast-moving global tech sector that mergers and acquisitions will come under the spotlight. Competition in this sector is as vital for consumers as any other, but it is also important to understand that tech innovation is also fast-moving and can be harmed by restrictions on mergers when better options may be available. Unwinding a merger such as Facebook and Giphy disincentivizes dynamic start-ups and can have a chilling effect on industry consolidation designed to be beneficial to consumers.

Background

Giphy is an online database and mobile search engine that allows users to share GIFs and stickers as well as animated text, emojis, and some short form videos. Users share GIFs and stickers with their contacts on messaging apps (e.g., email, iMessage, WhatsApp) or social media (e.g., Twitter, Snapchat, Facebook).

In May 2020, Facebook announced that it had agreed to a merger with Giphy.[1] The CMA subsequently served an initial enforcement order under section 72(2) of the Enterprise Act 2002 and invited comments as to "whether the creation of that situation may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services" on June 20, 2020. A merger inquiry was launched in January 2021 and on 12

August 2021, The CMA concluded that it had "provisionally found competition concerns as part of its in-depth investigation" into the merger.[2]

The merger between Facebook and Giphy is a consensual one, both parties agreed to the deal and there has been no consumer objection to it. The CMA unilaterally instigated the investigation based on its own concerns; there is no indication that the authority was acting on the merger being reported by third parties or consumers. This is confirmed by the CMA in its Summary of Third Party Interviews,[3] where it states that "Most third parties did not have particular views on the competitive effects of the Merger".

Facebook also supplied reassurances to address the concerns raised by the CMA prior to the enforcement order.[1] Specifically, Facebook stated, "We've used Giphy's API for years, not just in Instagram, but in the Facebook app, Messenger and WhatsApp. Giphy will continue to operate its library (including its global content collection), and we're looking forward to investing further in its technology and relationships with content and API partners. People will still be able to upload GIFs; developers and API partners will continue to have the same access to Giphy's APIs; and Giphy's creative community will still be able to create great content."

Is The CMA's Involvement Necessary or Proportionate?

The investigation in Facebook and Giphy sends a harmful signal that the CMA wishes to block mergers and acquisitions even if there is only a theoretical chance that competition will be harmed in the future. This kind of approach could have serious negative consequences for investment and innovation in the UK. Entrepreneurs who wish to attract investment to continue growing need to show investors that they can be profitable and join the public markets, or that they have a viable path to scale and rapid time to market by way of mergers and acquisitions.

It is a puzzling approach to British interests to send a message that innovative companies and their technologies that could benefit UK consumers and businesses will be excluded — or worse — on spurious grounds. The Giphy investigation is the type of over-enforcement that leads to flight of capital, depresses economic growth, and chills innovation.

Innovators and investors should be confident that regulators are acting evenly and without bias. The CMA's approach seems disproportionate to the envisaged threat considering reassurances given by Facebook towards access to Giphy's products.

The Giphy challenge by the CMA is lacking in adherence to competition or economic principles and gives an impression of a regulator acting on populist sentiment to restrict a politically-disfavored company.

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The CMA's Judgement

The CMA claim that Giphy could become a like-for-like competitor to Facebook does not stand up to scrutiny. Giphy is neither an actual competitor nor a reasonably likely potential competitor to Facebook. If this were the case, thousands of other startup companies could be considered the same. Giphy is not unique, and their business model can be replicated by new entrants to the market if a gap is identified. Far from stifling competition, Facebook's acquisition could just as easily spur a new supplier of these services.

The CMA's contention that Giphy could grow enough to expand into digital advertising is speculative and fanciful. CMA acknowledges that Giphy operated at a monthly loss going into the merger and fails to convincingly show that Giphy either would have devised a way to become profitable or secured additional financing.

The CMA has also not convincingly explained how Facebook would profit from cutting off supply of Giphy's library, or why it would have the incentive to do so. In short, Facebook's acquisition of Giphy, given the financial situation of the smaller firm stated above, likely ensures consumers will continue to have access to its services.

Concerns About the CMA Approach

The approach employed by the CMA could, conceivably, be used to stifle any proposed merger or acquisition, regardless of merit. It signals to investors that consolidation deals that could be beneficial to consumers may encounter pre-merger regulatory costs, thereby deterring innovation and investment in the online sector.

The CMA also appears quick to move directly to a prohibition of the merger instead of setting in stone Facebook's reassurances about the continuing availability of Giphy's library to developers and API partners. Rather than refuse permission for the deal and demand that Facebook "unwind the deal and sell off Giphy in its entirety,"[4] the CMA could require mandatory controls on the assurances made by Facebook, to be reviewed at regular intervals in the future.

The CMA also seems to misunderstand the fluidity of the tech sector. It is a rapidly evolving sector which has seen businesses previously considered as monopolizing social media tech come and go. MySpace, Tumblr, Bebo and others may well have been targeted in the same way by the CMA in the past but have fallen by the wayside. Government resources, and ultimately taxpayer resources, would be better employed in focusing on reducing regulatory obstructions to new entrants to the market rather than intervening between two consensual parties in a deal that benefits both and their consumers.

Respectfully submitted,

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[1] Facebook blog, “Facebook Welcomes Giphy as Part of Instagram Team,”, https://about.fb.com/news/2020/05/welcome-Giphy/, Vishal Shah, May 15, 2020
[2] CMA “Facebook, Inc / Giphy, Inc merger inquiry”, https://www.gov.uk/cma-cases/facebook-inc-Giphy-inc-merger-inquiry
[3] CMA “Summary of Third Party Interviews” https://assets.publishing.service.gov.uk/media/60dc68ba8fa8f50abf416ef5/Summary_of_third_party_calls.pdf
[4] CMA “Facebook’s takeover of Giphy raises competition concerns”, https://www.gov.uk/government/news/facebook-s-takeover-of-Giphy-raises-competition-concerns