

Completed acquisition by Meta Platforms, Inc. of GIPHY, Inc.

Decision to impose a penalty on Meta Platforms, Inc., Tabby Acquisition Sub Inc., and Facebook UK Limited under section 94A of the Enterprise Act 2002

Decision to impose a penalty

1. The Competition and Markets Authority (the **CMA**) hereby gives notice¹ to Meta Platforms, Inc., Tabby Acquisition Sub Inc. and Facebook UK Limited (together, **Meta**)² of the following:
 - (a) that it has imposed a penalty on Meta under section 94A of the Enterprise Act 2002 (the **EA02**) because it considers that Meta has, without reasonable excuse, failed to comply in certain respects with the requirements imposed on it by the initial enforcement order issued by the CMA under section 72 of the EA02 on 9 June 2020 to Meta and Giphy, Inc. (**Giphy**) (the **IEO**).³
 - (b) the penalty is a fixed amount of £1.5 million.
2. The IEO was addressed to Facebook, Inc. On 28 October 2021 Facebook, Inc. changed its name to Meta Platforms, Inc.⁴

Chronology

3. On 11 October 2021, the CMA by letter to Meta set out its initial concerns in relation to the suspected failures to comply with paragraphs 5(i) and 8(a) of the IEO. The failures to comply related to the resignation and departures of Ms [A], Mr [B], and Mr [C] from the employment of Meta. The CMA stated that it was considering imposing a penalty on Meta (the **Preliminary Letter**). Meta provided its submissions by letter dated 18 October 2021 (the **Preliminary Letter Response**).
4. On 21 December 2021, the CMA issued to Meta a provisional decision to impose a penalty under section 94A of the EA02 (the **Provisional Penalty**

¹ Notice is given pursuant to section 112 of the Enterprise Act 2002.

² References in this decision to Meta as a defined term should be construed as references to Meta Platforms, Inc., Tabby Acquisition Sub Inc., and Facebook UK Limited on a joint and several basis.

³ The IEO of 9 June 2020 is published at: [Initial enforcement order](#).

⁴ See [Amended and Restated Certificate of Incorporation of Meta Platforms, Inc.](#) as of October 28, 2021.

Decision). Meta provided written representations on the Provisional Penalty Decision on 14 January 2022 (the **Provisional Penalty Decision Response**).⁵ The CMA has considered the Provisional Penalty Decision Response and has reviewed the Provisional Penalty Decision accordingly. The submissions in the Preliminary Letter Response and the Provisional Penalty Decision Response are addressed in sections D and E below.

Structure of this document

5. This document is structured as follows:
 - (a) Section A sets out an executive summary.
 - (b) Section B sets out the legal framework.
 - (c) Section C sets out the factual background.
 - (d) Section D sets out the failures to comply without reasonable excuse.
 - (e) Section E sets out the CMA's reasons for finding that a penalty of £1.5 million is appropriate and proportionate in this case.
 - (f) Section F sets out next steps including Meta's right to appeal the CMA's decision to impose a penalty.

A. Executive Summary

Failure to comply with the IEO

6. The CMA has found that Meta failed to comply with the IEO by failing to notify the CMA of key staff resigning and departing the employment of Meta, and to seek the prior written consent of the CMA in advance of the key staff departing the employment of Meta.
7. Specifically, and as explained more fully in this document, the CMA has decided that Meta failed to comply with the IEO in the following respects:
 - (a) Failure to seek consent and actively inform the CMA of changes to key staff prior to the departure of Ms [A] and assumption of responsibilities by Mr [L];

⁵ The Provisional Penalty Decision also stated that Meta should contact the CMA within 5 days of receipt of the Provisional Penalty Decision to arrange a telephone conference call to discuss its written representations. Meta did not provide a response in relation to this.

- (b) Failure to seek consent and actively inform the CMA of changes to key staff prior to the departure of Mr [B] and assumption of responsibilities by Mr [K]; and
- (c) Failure to seek consent and actively inform the CMA of changes to key staff prior to the departure of Mr [C] and assumption of responsibilities by Mr [Z],

(together, the **Key Staff Departure Breaches**).

8. Prior to this decision, on 20 October 2021 the CMA imposed a penalty on Meta under section 94A of the EA02 for failures to comply with the IEO without reasonable excuse (the **October Penalty Decision**).

Risk of pre-emptive action

9. The CMA's ability to adopt interim measures has a similar purpose to the suspensory effect of merger notifications in many mandatory merger control regimes (such as the European Union). Interim measures play a critical role in preventing pre-emptive action. Breaches of the IEO undermine the CMA's ability to prevent, monitor and ultimately remedy any pre-emptive action taken by merger parties, ie action that might prejudice the outcome of the CMA's investigation or impede the taking of any remedial action that might ultimately be appropriate. The inclusion of Ms [A] and Messrs [B] and [C] in the list of key staff for the purposes of the Carve-Out Derogation followed extensive discussions with Meta on the scope of the IEO. Their inclusion reflected the importance of these three individuals to the Meta business, and of ensuring that the CMA remains aware of their departure and changes made to their role.
10. As a result of the failure to comply with the IEO, the CMA was not made aware of important developments at a business under investigation and this created the risk of prejudicing the CMA's ability to carry out important statutory functions under the UK merger regime.

No reasonable excuse

11. The CMA has carefully considered Meta's submissions and concluded that the explanations provided to the CMA do not amount to a reasonable excuse for the failure to comply with the IEO.

12. The Key Staff Departure Breaches were not caused by a significant and genuinely unforeseeable or unusual event. Nor were they caused by events beyond the control of Meta.⁶

Decision to impose penalty

13. The CMA has decided, having had regard to its statutory duties and the Penalties Guidance, and to all the relevant circumstances of the case, that:
- (a) it is appropriate to impose a penalty in connection with the Key Staff Departure Breaches, given the serious and particularly flagrant nature of Meta's failure to comply with the IEO in respect of the Key Staff Departure Breaches and the risks arising from them;
 - (b) the Key Staff Departure Breaches occurred after the CMA granted the Carve-Out Derogation and included a limited number of individuals in the list of key staff, and after the Monitoring Trustee provided recommendations designed to mitigate the risk of late notifications occurring. In the CMA's view these repeated instances of the same type of breach reflect Meta's failures to put in place sufficiently robust compliance processes which mitigated the effectiveness of Meta's ability to monitor planned and anticipated key staff changes. It is therefore appropriate to impose a single penalty in relation to the Key Staff Departure Breaches to better capture the gravity of Meta's conduct when taken in the round;
 - (c) it is appropriate and proportionate, in light of the nature and gravity of the Key Staff Departure Breaches, and of the CMA's policy objectives of incentivising compliance with interim measures and deterring future failures to comply by both Meta and other persons who may be considering future non-compliance, to impose a penalty of £1.5 million in relation to the Key Staff Departure Breaches; and
 - (d) in view of Meta's financial position and significant resources, the amount of the penalty for Meta's failure to comply is proportionate, given it is substantially below the statutory maximum of 5% of Meta's global turnover, it is not anomalous, nor would it affect Meta materially or disproportionately.

⁶ *Administrative penalties: Statement of Policy on the CMA's Approach (CMA4) (Penalties Guidance)*, paragraph 4.4.

B. Legal Framework

Relevant legislation

14. Section 72 of the EA02 is the basis for the IEO. Section 72(2) provides that the CMA may, by order, for the purpose of preventing pre-emptive action, impose certain restrictions and obligations.
15. Section 72(8) of the EA02 defines 'pre-emptive action' as '*action which might prejudice the reference concerned or impede the taking of any action ... which may be justified by the CMA's decisions on the reference*'.
16. Section 72(3C) of the EA02 provides that a person may, with the CMA's consent, take action (or action of a particular description) that would otherwise contravene an initial enforcement order. In practice, where the CMA grants such consent, it does so by making a derogation in respect of specific provisions of an initial enforcement order.
17. Section 86(6) of the EA02 provides that an order made pursuant to section 72 of the EA02 is an enforcement order. Sections 94(1) and 94(2) of the EA02 provide that any person to whom such an order relates has a duty to comply with it. A company is a person within the meaning of section 94(2) of the EA02 and Schedule 1 of the Interpretation Act 1978.
18. Section 94A(1) of the EA02 provides that '*Where the appropriate authority considers that a person has, without reasonable excuse, failed to comply with an interim measure, it may impose a penalty of such fixed amount as it considers appropriate*'.
19. Section 94A(2) of the EA02 provides that '*A penalty imposed under subsection (1) shall not exceed 5% of the total value of the turnover (both in and outside the United Kingdom) of the enterprises owned or controlled by the person on whom it is imposed.*'⁷
20. Section 94A(8) of the EA02 defines 'interim measure' as including an order made pursuant to section 72 of the EA02.
21. There is no statutory time limit within which the CMA must impose a penalty under section 94A(1) of the EA02.

⁷ The Enterprise Act 2002 (Mergers) (Interim Measures: Financial Penalties) (Determination of Control and Turnover) Order 2014 makes provision for when an enterprise is to be treated as controlled by a person and the turnover of an enterprise.

22. Section 94B(1) and (2) of the EA02 requires the CMA to prepare and publish a statement of policy on how it uses its powers to impose a financial penalty under section 94A of the EA02 and how it will determine the level of the penalty imposed.⁸
23. Section 114 of the EA02 provides an appeal mechanism for a person on whom a penalty is imposed.

The concept of pre-emptive action

24. The meaning of ‘pre-emptive action’ and the role of interim measures in merger control has been considered by the Competition Appeal Tribunal (the **Tribunal**) on a number of occasions.
25. In *Intercontinental Exchange, Inc v Competition and Markets Authority*⁹ the Tribunal observed that “‘pre-emptive action’ is a broad concept. It concerns conduct which might prejudice the reference or which might impede action justified by the CMA’s ultimate decision’.¹⁰ In *Facebook v CMA*, the Tribunal (subsequently upheld by the Court of Appeal) added that pre-emptive action includes ‘action that has the potential to affect the competitive structure of the market during the CMA’s investigation’.¹¹
26. The breadth of the CMA’s statutory powers to prevent pre-emptive action was emphasised by the Court of Appeal in *Facebook v CMA (CoA)*. The Court of Appeal confirmed those powers include the ability to regulate activity merging parties might take in connection with or as a result of the merger that has the potential to affect the competitive structure of the market in question during the merger investigation.¹²
27. In *Stericycle International LLC & Anors v Competition Commission*¹³ the Tribunal considered the meaning of pre-emptive action in section 80(10) of the EA02¹⁴ and held that ‘the word “might” implies a relatively low threshold of expectation that the outcome of a reference might be impeded’.¹⁵ The

⁸ On 10 January 2014, the CMA published the Penalties Guidance.

⁹ *Intercontinental Exchange, Inc v Competition and Markets Authority* [2017] CAT 6 (***Intercontinental Exchange***).

¹⁰ *Ibid* at paragraph 220.

¹¹ *Facebook v CMA* [2020] CAT 23 (*Facebook v CMA*) at paragraph 124; see also at paragraph 21. The Tribunal’s judgment was upheld by the Court of Appeal (*Facebook v CMA* [2021] EWCA Civ 701 (*Facebook v CMA (CoA)*), at paragraph 56).

¹² *Facebook v CMA (CoA)* at paragraph 56.

¹³ *Stericycle International LLC, Stericycle International Limited and Sterile Technologies Group Limited v Competition Commission* [2006] CAT 21 (***Stericycle***).

¹⁴ Section 72 of the EA02 relates to orders made during a Phase 1 merger investigation. The orders made during a Phase 2 merger investigation are made under section 81 of the EA02. The definition of ‘pre-emptive action’ for the purposes of section 81 of the EA02 is defined in section 80(10) of the EA02 and is in identical terms to the definition in section 72(8) of the EA02.

¹⁵ *Stericycle* at paragraph 129.

Tribunal added that at the time of considering whether to exercise the statutory powers to make an interim order (for the purpose of preventing pre-emptive action), the CMA necessarily cannot be sure whether any action being taken (or proposed to be taken) by the merging parties ‘*will ultimately*’ impede any action being taken by the CMA as a result of the reference.¹⁶

28. In *Intercontinental Exchange* the Tribunal held that ‘*[t]he word “might” means that it is the possibility of prejudice to the reference or an impediment to justified action which is prohibited. The IEO catches more than just actual prejudice or impediments, which is why the onus is on the addressee of the IEO to seek consent from the CMA if their conduct creates the possibility of prejudice or an impediment*’.¹⁷ The Tribunal also held that ‘*... where an IEO has been issued, it is incumbent on parties to take a carefully considered view as to whether their conduct might arouse the reasonable concern of the CMA that the agreements that they reach are significant enough that they might prejudice the reference or impede justified action...*’.¹⁸

The purpose of an IEO

29. The Supreme Court has held that ‘*[t]he purpose of merger control is to regulate in advance the impact of concentrations on the competitive structure of markets*’.¹⁹
30. It is of central importance to the UK’s voluntary, non-suspensory merger regime to regulate in advance the impact of a merger on the competitive structure of markets that interim measures should be effective, particularly where, as in this case, the merger is completed before it is identified and examined by the CMA. In *Facebook v CMA*, the Tribunal recognised the wide power conferred on the CMA by section 72 of the EA02 in imposing interim measures and noted that ‘*[t]he corollary of the voluntary nature of the regime is that the CMA is given wide powers to suspend the integration of merging companies and it is for merging parties to satisfy the CMA that the relaxation of any interim measures imposed by the CMA is justified*’.²⁰
31. The purpose of an IEO is to prevent any action which might prejudice the merger investigation or impede the taking of any action which may be justified by the CMA’s decision on the reference.²¹ The broad nature of pre-emptive action is reflected in the similarly broad wording of the IEO which the Tribunal

¹⁶ *Ibid.* Affirmed in *Facebook v CMA* at paragraph 124.

¹⁷ *Intercontinental Exchange* at paragraph 220.

¹⁸ *Ibid* at paragraph 223.

¹⁹ *Société Coopérative de Production SeaFrance SA (Respondent) v The Competition and Markets Authority and another (Appellants)* [2015] UKSC 75 at paragraph 4; see also paragraph 35.

²⁰ *Facebook v CMA* at paragraph 156.

²¹ Section 72(8) of the EA02.

held in *Intercontinental Exchange* ‘should be interpreted to give full effect to its legitimate precautionary purpose’.²² Given the statute’s precautionary purpose, the Tribunal in *Facebook v CMA* confirmed the CMA has a wide margin of appreciation in imposing an IEO under section 72 of the EA02. The Tribunal further added in that case that the role of interim measures also includes preventing anti-competitive harm from the merger impacting the position of other undertakings on any affected markets, which may be irretrievably detrimental.²³

32. More generally, in *Electro Rent*²⁴, the Tribunal noted that ‘*[the] CMA’s role in regulating merger activity, and its ability to do so effectively, is a matter of public importance*’ and agreed with the CMA’s submission that interim orders serve a particularly important function where, as in the case in question, the merger has been completed before it was examined by the CMA.²⁵
33. Where a merger has been completed and an IEO has been imposed, it is critical that any business which has been acquired continues to compete independently with the acquiring business and is maintained as a going concern. This is to ensure that the viability and competitive capability of each of the merging parties is not undermined pending the outcome of the merger investigation, as this would risk prejudicing the reference or impeding any action the CMA might need to undertake should it ultimately find that the merger has resulted in a substantial lessening of competition (and any resulting adverse effects).
34. Consistent with the above, the IEO contains positive obligations on the addressees to do certain things as well as obligations to refrain from taking certain actions. The Tribunal in *Facebook v CMA* noted that ‘***it is of the utmost importance that interim measures are scrupulously complied with when the CMA is considering a derogation request and merging parties should not themselves form judgements or reach decisions that are properly for the CMA***’ (emphasis added).²⁶ The onus is on the merging parties to seek consent if their conduct creates the possibility of prejudice or impediment²⁷ and engage with the CMA by submitting a derogation request which is ‘*fully specified, reasoned and supported by relevant evidence*’.²⁸

²² *Intercontinental Exchange* at paragraph 220.

²³ *Facebook v CMA* at paragraph 21, upheld in *Facebook v CMA (CoA)* at paragraph 59.

²⁴ *Electro Rent Corporation v Competition and Markets Authority* [2019] CAT 4 (***Electro Rent***).

²⁵ *Ibid* at paragraph 120. The Tribunal stated at paragraph 200 that ‘*it is a matter of public importance that the merger control process, and the duties that it creates, are strictly, and conscientiously, observed.*’

²⁶ *Facebook v CMA* at paragraph 158; see also *Electro Rent* at paragraph 206.

²⁷ *Intercontinental Exchange* at paragraph 220.

²⁸ *Facebook v CMA* at paragraph 156.

35. Within that context, the requirements that no changes are made to the structure of the relevant businesses and their key staff without consent from the CMA, and that the CMA be actively informed of any material developments such as details of key staff who leave or join the relevant businesses are important obligations in the IEO. This ensures that the CMA is in a position to consider whether any such change or any such material development may require action to be taken in order to prevent or mitigate a prejudice to the reference or to the CMA's ability to remedy any substantial lessening of competition it may find. It is important that businesses take seriously their compliance obligations, including that they put in place appropriate compliance processes and that their staff comply with these in order to ensure that any material development and proposed change to key staff be reported to the CMA in a timely manner.
36. In accordance with its precautionary purpose, the IEO seeks to protect against the *possibility or risk* of prejudice to the reference or potential remedies. It is incumbent on merging parties to comply with all obligations under the IEO, including the monitoring and reporting obligations. When assessing whether there has been a failure to comply with interim measures, the CMA does not need to demonstrate that the conduct of a merging party would impact the competitive structure of the market, nor demonstrate that it has caused actual prejudice to the outcome of a reference or impeded the taking of any appropriate remedial action.²⁹ A failure to comply with the obligations set out in the IEO is in itself sufficient to engage the penalty provisions under section 94A of the EA02.

Relevant provisions of the IEO

37. The provisions of the IEO relevant to the assessment carried out in this decision are as follows:³⁰

Paragraph 5

'5. Further and without prejudice to the generality of paragraph 4 and subject to paragraph 3, [Meta], Tabby Acquisition, Facebook UK and Giphy shall at all times during the specified period procure that, except with the prior written consent of the CMA:

²⁹ See paragraphs 79 to 81 of Notice of penalty addressed to Electro Rent Corporation dated 12 February 2019, [Penalty Notice \(publishing.service.gov.uk\)](https://publishing.service.gov.uk) and paragraphs 115 to 116 of Notice of penalty addressed to Paypal Holdings, Inc. dated 18 September 2019, [Penalty notice \(publishing.service.gov.uk\)](https://publishing.service.gov.uk).

³⁰ Note a Variation Order was made on 29 June 2021 pursuant to section 72(4)(b) of the EA02 to vary the IEO in light of the derogation granted by the CMA on 29 June 2021. The Variation Order is available [here](#). These were the provisions of the IEO in force at the time the conduct described in this decision occurred.

...

(i) no changes are made to key staff of the Giphy business or [Meta] business;'

Paragraph 7

'7. [Meta], Tabby Acquisition, Facebook UK and Giphy shall provide to the CMA such information or statement of compliance as it may from time to time require for the purposes of monitoring compliance by [Meta], Tabby Acquisition, Facebook UK and Giphy and their subsidiaries with this Order. In particular, on 23 June 2020 and subsequently every two weeks (or, where this does not fall on a working day, the first working day thereafter) the Chief Executive Officer or other persons as agreed with the CMA of each of [Meta], Tabby Acquisition, Facebook UK and Giphy shall, on behalf [Meta] / Tabby Acquisition / Facebook UK / Giphy provide a statement to the CMA in the form set out in the Annex to this Order confirming compliance with this Order.'

Paragraph 8

'8. At all times, [Meta], Tabby Acquisition, Facebook UK and Giphy shall, or shall procure that Giphy shall, actively keep the CMA informed of any material developments relating to the Giphy business or the [Meta] business, which includes but is not limited to:

(a) details of key staff who leave or join the Giphy business or the [Meta] business;'

38. The definitions in the IEO applicable to the provisions set out above are:

- (a) **'commencement date'** means 9 June 2020;
- (b) **'the [Meta] business'** means the business of [Meta] and its subsidiaries carried on as at the commencement date;
- (c) **'the Giphy business'** means the business of Giphy and its subsidiaries carried on as at the commencement date; and
- (d) **'key staff'** means staff in positions of executive or managerial responsibility and/or whose performance affects the viability of the business.

C. Factual Background

The Transaction

39. On 15 May 2020, Meta acquired via its direct, wholly owned, subsidiary Tabby Acquisition Sub, Inc. all outstanding equity in Giphy, Inc (the **Merger**). The transaction was not notified to the CMA, but was subsequently detected by the CMA's mergers intelligence committee. Meta was informed on 5 June 2020 that the CMA's mergers intelligence committee had determined that a merger investigation was warranted.
40. Meta is a publicly traded company listed on NASDAQ, with headquarters in California. It has more than 250 subsidiaries across the globe. The Meta group offers various online products and services worldwide, including the Facebook app, Instagram, Messenger, WhatsApp, Oculus, Portal, Workplace and others.
41. Giphy, which was founded in 2013 and is headquartered in New York, is also active worldwide with an online database and search engine that allows users to search and share GIFs (Graphic Interchange Format image files) and GIF stickers (GIFs with transparency allowing them to be applied on top of images or text).

The IEO

42. On 9 June 2020, the CMA issued the IEO (based on a standard template)³¹ addressed to both Meta and Giphy (the **Parties**) in accordance with section 72(2) of the EA02 to prevent pre-emptive action. The IEO is still in force.³²
43. On 19 June 2020, the CMA issued directions under paragraph 10 of the IEO for the Parties to appoint a monitoring trustee (the **Monitoring Trustee**) for the purpose of monitoring compliance with the IEO (the **Directions**).³³ The Monitoring Trustee was appointed on 3 July 2020.
44. On 30 July 2020, the CMA also issued directions under paragraph 10 of the IEO for the Parties to appoint a Hold Separate Manager to ensure (among

³¹ The IEO template is used by the CMA as the basis for interim measures made by it under the EA02 in relation to completed mergers. The IEO template is available [here](#).

³² The IEO remained in force after the commencement of the Phase 2 investigation of the Merger. A Variation Order was made on 29 June 2021 pursuant to section 72(4)(b) of the EA02 to vary the IEO in light of the derogation granted by the CMA on 29 June 2021 (see paragraph 76 below). The Variation Order is available [here](#).

³³ [Directions issued on 19 June 2020 pursuant to paragraph 10 of the Initial Enforcement Order imposed by the Competition and Markets Authority on 9 June 2020 on: Meta, Inc, Tabby Acquisition Sub, Inc, Meta UK Limited and Giphy, Inc.](#)

other matters) that Giphy was operated separately from, and independently of, Meta.³⁴

Derogations to the IEO and the development of the key staff list

Meta's derogation requests

45. On 10 June 2020, Meta wrote to the CMA and requested several carve-out derogations to the IEO. In summary, Meta requested that paragraphs 4(b), 5(c), 5(e), 5(i), 5(k) and 8 of the IEO no longer apply to it and its subsidiaries, on the basis that '*such a derogation is proportionate and in line with the aims of the IEO, particularly in circumstances where the Parties' activities do not horizontally overlap and GIPHY generates zero UK revenues*' (the **COD Request**).³⁵
46. The CMA responded to Meta on 12 June 2020 with questions relating to each of the derogations requested, including the COD Request.³⁶ The CMA was ultimately not able to take a decision on the COD Request as a result of the limited information and evidence provided by Meta to support the broad nature of the request.
47. On 26 August 2020, Meta filed an application under section 120 of the EA02 for a review by the Tribunal of the CMA's 'refusal' to grant a derogation in relation to the COD Request. On 13 November 2020, the Tribunal handed down its judgment dismissing all of Meta's grounds of challenge.³⁷
48. Following the Tribunal's judgment, on 23 November 2020, Meta submitted an updated carve-out derogation request (the **Updated COD Request**) seeking to exclude Meta's subsidiaries with no connection to '*GIF-related Activities*' (as defined by Meta) from the scope of the IEO, and limit the IEO obligations of the remaining entities³⁸ to '*GIF-related Activities*'.
49. The Updated COD Request referred to a total of [§<] employees who variously managed the Tenor and Giphy relationship, product managers who were

³⁴ [Directions issued on 30 July 2020 pursuant to paragraph 10 of the Initial Enforcement Order made by the Competition and Markets Authority on 9 June 2002 pursuant to section 72\(2\) of the Enterprise Act 2002.](#)

³⁵ Meta's letter of 10 June 2020, paragraph 5.

³⁶ Further details on the derogations sought are set out in the CMA's [Penalty notice \(publishing.service.gov.uk\)](#) issued to Facebook (as it then was) on 20 October 2021, paragraph 52 *et seq.*

³⁷ On 17 December 2020, Meta applied to the Court of Appeal for permission to appeal the Tribunal's judgment. Permission to appeal was granted on 10 February 2021. The Court of Appeal hearing took place on 28 and 29 April 2021, and judgment handed down on 13 May 2021. The Tribunal's judgment was upheld in full by the Court of Appeal.

³⁸ At the time of the derogation request, these entities were Facebook, Inc (which includes Messenger), Facebook Ireland Ltd., WhatsApp Inc., and WhatsApp Ireland Ltd.

working on GIF-related Activities (as defined by Meta), and line managers for each of these employees.³⁹

50. In the Updated COD Request, Meta also submitted that:

‘... [Meta] cannot legally restrict voluntary departures from the company, but will notify the CMA of any such departures/ proposed replacements.’⁴⁰

51. Following the receipt of the necessary information, the CMA granted derogations to exclude most of Meta’s subsidiaries from the scope of the IEO.⁴¹

52. To narrow the scope of the IEO obligations in respect of the remaining Meta subsidiaries, the CMA and Meta discussed key aspects of the request such as the definition of, and reporting requirements in relation to, GIF-related Activities and key staff. In its letter of 15 March 2021, Meta submitted a proposed list of [X] people who would remain within the scope of the IEO as key staff if the Updated COD Request was granted. This key staff list was updated by Meta on 21 April 2021 and 13 May 2021 to reflect changes, such as changes of reporting lines and the addition of relevant staff.

Changes to key staff notified by Meta before the Carve-Out Derogation of 29 June 2021

53. On 29 June 2021, the CMA granted a derogation limiting the application of certain provisions of the IEO in relation to Meta (the **Carve-Out Derogation**). Before the Carve-Out Derogation was granted, Meta informed the CMA of key staff departures where the individuals had resigned. Where a derogation was granted, the CMA obtained the necessary information to ensure that the risk of pre-emptive action was low and appropriate safeguards were in place. The details of the derogations granted in relation to these individuals are set out in Appendix 1 to this decision. Below is a summary of each of these notifications and, where applicable, the derogations granted.

³⁹ During the Tribunal proceedings, on 28 October 2020, Meta submitted that it had identified [X] employees that could be described as directly involved in managing the relationship with Giphy.

⁴⁰ Updated COD Request, page 12.

⁴¹ A derogation was granted on (i) [22 December 2020](#) in respect of dormant or inactive subsidiaries, holding company subsidiaries, and subsidiaries that do not engage in any GIF-related Activities (as defined by the CMA); (ii) [8 February 2021](#) in respect of data centres; and (iii) on [24 February 2021](#) in respect of entertainment entities and local ad and sales entities, which only engaged in GIF-related Activities (as defined by the CMA) on an ad-hoc or de minimis basis.

5 February 2021 derogation request – Mr [P]

54. On 5 February 2021, Meta emailed the CMA to inform it that Mr [P], one of the product managers listed in the Updated COD Request, had resigned. Mr [P]'s departure date was at the time of the email still to be determined.
55. The CMA responded to Meta's email on 9 February 2021 with further questions regarding Mr [P]'s departure and explained it was treating the request as a derogation request.
56. Meta responded to the CMA's questions on 15 February 2021 and indicated that Mr [P] would be departing two days later on 17 February 2021.
57. No derogation was ultimately issued for Mr [P]'s departure, given the indicated imminent date of departure. The CMA is also unable to grant derogations retrospectively.

15 February 2021 – Ms [T]'s departure

58. Meta's email of 15 February 2021 regarding Mr [P] also notified the CMA of the resignation of Ms [T] ([X]). According to Meta, Ms [T] was due to leave the company '*later [that] week*' and her responsibilities would be taken over by Mr [E] ([X]) until her role was filled. Meta noted in its email that Ms [T] was not involved in GIF-related Activities (other than on an ad hoc or de minimis basis), nor was she named in its Updated COD Request.
59. On 4 June 2021, Meta responded to the CMA's section 109 EA02 notice of 21 May 2021 containing questions regarding Ms [T]. In its response, Meta stated that it became aware of Ms [T]'s departure on or about 13 January 2021 when she discussed it with her management.⁴² Meta's compliance team learnt of her departure on 3 February 2021. Ms [T] departed Meta on 16 February 2021, however this date of departure was not communicated to Meta's HR until 10 February 2021.⁴³
60. By virtue of her role as [X], Meta confirmed that Ms [T] had also been a control owner in Meta's sub-certification process. She was responsible for confirming the accuracy of statements regarding the Messenger product.⁴⁴
61. No derogation was ultimately issued for Ms [T]'s departure, given the indicated imminent date of departure.

⁴² Meta's response to section 109 notice of 21 May 2021 dated 4 June 2021, paragraph 11.3.

⁴³ Meta's response to section 109 notice of 21 May 2021 dated 4 June 2021, paragraph 11.3.

⁴⁴ Meta's response to section 109 notice of 21 May 2021 dated 4 June 2021, paragraph 11.2.

13 May 2021 derogation request – Mr [G]

62. On 13 May 2021, Meta notified the CMA of an update to its list of key staff to include Mr [G]. Seven days later, on 20 May 2021, Meta informed the CMA by email that it had '*become aware*' that Mr [G] intended to leave the company to take up a new role at a start-up company.
63. On 25 May 2021, the CMA asked Meta further questions, regarding Mr [G]'s handover of responsibilities, and sought clarification of his exact departure date. Meta responded on the same day, informing the CMA that the head of Mr [G]'s team would take over Mr [G]'s responsibilities, and that Mr [G]'s departure date was 1 June 2021.
64. The CMA ultimately consented to a derogation from paragraph 5(i) of the IEO to permit this key staff change strictly on the basis that there would be no adverse impact to the GIF-related Activities carried out by Mr [G], that there would be no other organisational or key staff resulting from Mr [G]'s departure and replacement, and that the derogation would not lead to any integration of the Meta and Giphy businesses.⁴⁵

26 May 2021 derogation request – Mr [N]

65. Meta first notified the CMA of the imminent departure of Mr [N], [X], by email on 26 May 2021, and noted his last day would be 4 June 2021. Meta informed the CMA it intended to announce his departure the same day, ie 26 May 2021.
66. The CMA noted this information in its email of 28 May 2021 and requested that, in the future, Meta give the CMA advance notice of any urgent actions which required a derogation, particularly in circumstances where Meta may have been aware of the planned key staff change for some time.
67. The CMA ultimately consented to the derogation from paragraph 5(i) of the IEO to permit this key staff change strictly on the basis that Mr [O] had the capacity and experience to take on the GIF-related Activities carried out by Mr [N], that there would be no other organisational or key staff resulting from Mr [N]'s departure and replacement, and that the derogation would not lead to any integration of the Meta and Giphy businesses.⁴⁶

⁴⁵ Derogation of 28 May 2021.

⁴⁶ Derogation of 4 June 2021.

10 June 2021 derogation request – Mr [J]

68. Mr [J] was added to the key staff list on 20 May 2021, following a derogation request on 11 May 2021 to launch the '[X]' app. On 10 June 2021, Meta notified the CMA that Mr [J]'s departure would take place on 11 June 2021, the very next day. Meta explained in its email that:

'The delayed notice is due to a genuine and inadvertent miscommunication between the NPE team and [Meta]'s compliance team (the NPE team inadvertently assumed that notice of Mr [J]'s proposed departure had already been communicated to the compliance team).'

69. On 10 June 2021, the CMA asked Meta questions regarding Mr [J]'s departure and requested an urgent response, noting that:

'Whilst we appreciate there has been a miscommunication in this instance, we note that Mr [J] is due to leave tomorrow, therefore the time available to the CMA to consider this request is already very short. As you know, we cannot grant a derogation retrospectively.'

70. The CMA ultimately consented to the derogation from paragraph 5(i) of the IEO to permit the change in staff strictly on the basis that there would be no adverse impact to the GIF-related Activities carried out by Mr [J], that there would be no other organisational or key staff resulting from Mr [J]'s departure and replacement, and that the derogation would not lead to any integration of the Meta and Giphy businesses.⁴⁷

The Carve-Out Derogation of 29 June 2021

71. On 29 June 2021, the CMA granted the Carve-Out Derogation. In relation to paragraph 5(i) of the IEO, the Carve-Out Derogation limited the application of this paragraph to certain key staff at Meta, including staff who were:

- (a) identified in Annex 1 to the Carve-Out Derogation⁴⁸ (which could be varied with the prior written consent of the CMA, including via email); and
- (b) in positions of executive or managerial responsibility and/or whose performance affected the viability of the Meta business, and were engaged in work that had a material impact on Meta's GIF-related

⁴⁷ [Derogation of 11 June 2021](#).

⁴⁸ At the time of granting the Carve-Out Derogation, there were [X] key staff members identified in Annex 1. A small number of individuals have been added (and removed) since the Carve-Out Derogation was granted.

Activities (noting that such material impact may be the result, for example, of an operational, strategic or compliance role).

72. The Carve-Out Derogation further specified that:

'From the moment that a [Meta] 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 [Meta] will promptly inform the CMA, who will add the employee and their direct manager to the list of key staff identified in Annex 1.'

The Monitoring Trustee's recommendations following the Carve-Out Derogation

73. The compliance controls⁴⁹ which are relevant to Meta's monitoring of any changes to its key staff are controls C23B, C23C, C23D, C23E and C23F. As at 17 August 2021, the controls were as follows:⁵⁰

- (a) Control C23B: the control owner certifies that *'Apart from any items which have already been brought to Compliance's attention, there have been no changes (hires, reorgs, terminations) for (1) Mr [D]; (2) the heads of WA, MSGR, IG or Facebook Blue.'*
- (b) Control C23C: the control owner certifies that *'Apart from any items you may have already brought to Compliance's attention ([&<]), there have been no changes (hires, reorgs, terminations) among the senior executive team.'*
- (c) Control C23D: the control owner certifies that *'Apart from any items that have already been brought to Compliance's attention, to our knowledge, there have been no changes and there are no planned upcoming changes, (hires, reorgs, terminations) among any employees designated by compliance as key staff.'*
- (d) Control C23E: the control owner certifies that *'The [HR Business Partners ('HRBPs')] for key staff have been notified of the requirements regarding "key staff." Compliance contacts the HRBPs before every certification period to verify any changes.'*

⁴⁹ Individual Meta employees who are designated 'control owners' are sent forms shortly before each certification is due and asked to confirm compliance with assigned 'controls'. Meta's IEO compliance team reviews all responses from control owners and confirms with Meta's Chief Compliance Officer once all control owners have certified.

⁵⁰ Twenty-eighth Monitoring Trustee Report to the CMA, dated 17 August 2021, and Meta's 27 July and 10 August 2021 Certification Form Responses.

- (e) Control C23F: the control owner certifies that *'Any employee designated as "key staff" receives a communication from Compliance informing them of the obligation under the IEO and asking them to notify compliance before any changes to their roles.'*
74. On 29 June 2021, the Monitoring Trustee's email to Meta noted the requirements set out by the CMA in its letter of 19 February 2021 regarding the Updated COD Request. The Monitoring Trustee asked Meta to *'confirm what process will be used to keep the CMA apprised of any expected changes, with an appropriate lead time for CMA review'*.⁵¹
75. According to the Monitoring Trustee, Meta responded to this query as follows:⁵²
- (a) Meta's HRBPs (who oversee employee groups with key staff members) had been informed of their obligations under the IEO and the need to inform Meta's compliance team as soon as possible about any upcoming key staff changes to provide the CMA enough lead time to consider the request;
 - (b) Employees who were on the key staff list would receive a special privileged communication regarding their obligations as key staff, and a reminder to inform Meta's compliance team of changes to any of their work, their team's work, or their roles. These employees were also on the monthly email reminder sent to all employees, which included a reminder that key staff must notify compliance of any upcoming staff changes;
 - (c) As new staff are added to the key staff list, those staff members would receive the same email informing them of their addition to the list of key staff, the rationale, and expectation that compliance be informed of any changes to their roles or responsibilities as soon as possible. Their HRBPs would be copied (Control C23F);
 - (d) Every two weeks, on the Thursday before each certification is due, Meta's compliance team would verify with the HRBPs regarding any staff changes (Control C23E); and
 - (e) Meta's senior HR leadership was also aware of the IEO obligations with respect to the executive team, and would notify Meta's compliance team of any changes to the key staff on the senior executive team, including

⁵¹ Monitoring Trustee email to the CMA dated 5 October 2021.

⁵² Monitoring Trustee email to the CMA dated 5 October 2021.

providing a bi-weekly certification as part of the IEO certification process (Control C23C).

76. According to the Monitoring Trustee, Meta endeavoured to proactively identify any changes and bring these changes to the CMA's attention as soon as possible.⁵³
77. On 17 August 2021 the Monitoring Trustee made a number of suggestions to Meta on its compliance controls. With respect to the compliance controls listed at paragraph 73 above, the Monitoring Trustee made the following recommendations:⁵⁴
- (a) that compliance controls C23B, C23C, C23E and C23F are amended to include future and planned changes (as the existing wording at the time only captured actual changes) in order for Meta to make the required consent requests in respect to changes made to key staff, and so as to provide the CMA with adequate time to consider such derogation requests.
 - (b) that control owners for C23B, C23C, and C23D confirm whether any departmental reorganisations that could negatively impact Meta's GIF-related Activities have taken place or are contemplated;
 - (c) control owners for C23B, C23C, C23D and C23E should confirm what efforts have been made to retain key staff who have indicated that they want to leave; and
 - (d) controls C23B, C23D, and C23E should more properly be certified by a senior individual in HR, rather than compliance.
78. Although the recommendation in paragraph 77(a) above was made by the Monitoring Trustee in August 2021 (ie prior to the Key Staff Departure Breaches), Meta only confirmed to the Monitoring Trustee on 4 October 2021 (ie after the Key Staff Departure Breaches) that it would amend its controls to include future and planned changes.⁵⁵

⁵³ Monitoring Trustee email to the CMA dated 5 October 2021.

⁵⁴ Monitoring Trustee email to the CMA dated 5 October 2021.

⁵⁵ Monitoring Trustee email to the CMA dated 5 October 2021.

October Penalty Decision

79. In the October Penalty Decision, imposed under section 94A of the EA02 on Meta on 20 October 2021, the CMA determined three separate breaches of the IEO as follows:
- (a) **Breach 1 (Qualified compliance statements):** The CMA found that Meta had repeatedly failed to comply with paragraph 7 of the IEO by failing to submit fortnightly compliance statements in the appropriate form and, instead, submitting compliance statements that were accompanied by significant qualifications;
 - (b) **Breach 2 (Tenor outage):** The CMA found that Meta failed to comply with paragraph 8(b) of the IEO in relation to a loss of service affecting the provision of Tenor GIFs on Meta surfaces; and
 - (c) **Breach 3 (Change of roles of key staff):** The CMA found that Meta failed to comply with paragraphs 5(c) and 5(i) of the IEO in relation to the following individuals changing role within the Meta business without consent being sought:
 - i. [Facebook Employee 1] leaving her role as acting Chief Compliance Officer and being replaced by [Facebook Employee 2]; and
 - ii. [Facebook Employee 3] taking over as Chief Compliance Officer from [Facebook Employee 2].

D. Failures to comply with the IEO

80. Paragraph 5(i) of the IEO requires that Meta shall at all times during the specified period procure that, except with the prior written consent of the CMA, no changes are made to key staff of the Meta business or Giphy business. This obligation is expressed without qualification.
81. Paragraph 8(a) of the IEO requires that Meta shall at all times actively keep the CMA informed of any material developments relating to the Meta business which includes, but is not limited to, details of key staff who leave or join the Meta business or the Giphy business.
82. The failures to comply identified in this decision relate to the resignation and departures of Ms [A], Mr [B] and Mr [C] from the employment of Meta. Messrs [B] and [C] were on the key staff list when the Carve-Out Derogation was granted on 29 June 2021, and Ms [A] was added to the key staff list on 1 September 2021. Ms [A] and Mr [B] left Meta on 7 September and Mr [C] left

Meta on 20 September. After these employees departed Meta, the CMA was informed of Ms [A]’s departure on 10 September 2021, Mr [B]’s departure on 20 September 2021, and Mr [C]’s departure on 22 September 2021.

83. On the basis of the evidence provided to the CMA, and following careful assessment of the Provisional Penalty Decision Response, for the reasons set out below the CMA has decided that Meta has failed to comply with the IEO in the following respects:
- (a) Meta failed to seek consent and actively inform the CMA of changes to key staff prior to the departure of Ms [A] and assumption of responsibilities by Mr [L];
 - (b) Meta failed to seek consent and actively inform the CMA of changes to key staff prior to the departure of Mr [B] and assumption of responsibilities by Mr [K]; and
 - (c) Meta failed to seek consent and actively inform the CMA of changes to key staff prior to the departure of Mr [C] and assumption of responsibilities by Mr [Z].

Departure of Ms [A] and assumption of responsibilities by Mr [L]

Facts

Inclusion of Ms [A] into the key staff list

84. On 20 August 2021, Meta informed the CMA by email of the development of a new ‘[<]’ feature on the Facebook Lite Service.⁵⁶ This project was explained to be a ‘[<]’ that would ‘[<]’. Meta stated that the proposed product development came to the attention of Meta’s IEO compliance team as part of its internal compliance controls which monitors product developments. In that email, Meta provided reasons why it did not consider that consent from the CMA should be necessary in this instance.
85. On 23 August 2021, the CMA asked Meta, among other questions, which employees within Meta were working on the feature. The CMA noted in its email that ‘*Given that this constitutes GIF-related Activities, the CMA would*

⁵⁶ The Facebook Lite service is described by Meta as a less data-intensive version of the Facebook App, designed for users with poor network connections or limited data storage. This feature has a total monthly active users in the UK representing [<] of all total monthly users of the Lite Service.

expect that [Meta] includes these individuals in the list of key staff attached to the Carve-Out Derogation of 29 June 2021.'

86. On 1 September 2021, Meta provided its response to the CMA's questions by email. Meta identified four employees including Ms [A] ([X]) as Meta employees who were responsible for managing the project in their day to day roles. Meta confirmed that these individuals would be added to the key staff list. Meta provided the CMA with an updated list of key staff on 3 September 2021.

Ms [A]'s resignation and departure

87. On 23 August 2021, Ms [A] informed her line manager, Mr [R], of her intention to leave Meta. Mr [R] informed Ms [H] (HR) and Mr [I] (Ms [A]'s skip level manager) of this development on the same day. Ms [A] also submitted her resignation on Meta's 'People Portal' platform the same day.⁵⁷
88. Ms [A]'s exit interview took place on 2 September 2021.⁵⁸ Ms [A] informed Meta's compliance team of her resignation on 7 September 2021, her last day of employment at Meta.⁵⁹
89. On 10 September 2021, Meta informed the CMA that Ms [A] had provided notice of her intention to leave Meta on 23 August 2021 and departed the employment of Meta on 7 September 2021. According to Meta, her inclusion in the updated key staff list of 3 September 2021 was therefore an 'error'.
90. Meta informed the CMA that as a result of Ms [A]'s departure, her replacement on the project (Mr [L]) was added to the updated key staff list.
91. Ms [A]'s resignation and subsequent departure was not mentioned in Meta's compliance statements dated 2 September 2021⁶⁰ (covering the reporting period of 25 August to 7 September 2021) and 20 September 2021 (covering the reporting period of 8 September to 21 September 2021).

Ms [A]'S position as key staff

92. Meta described Ms [A]'s addition to the key staff list on 1 September 2021 as an 'error' because she had provided notice of her intention to leave Meta on 23 August 2021 and departed on 7 September 2021. The CMA disagrees with

⁵⁷ Facebook's response to the section 109 notice of 13 October 2021 dated 25 October 2021, paragraph 1.1.

⁵⁸ Facebook's response to the section 109 notice of 13 October 2021 dated 25 October 2021, paragraph 1.4.

⁵⁹ Facebook's response to the section 109 notice of 13 October 2021 dated 25 October 2021, paragraph 2.1.

⁶⁰ Meta explained to the CMA that this compliance statement was signed on 2 September 2021 because 3 and 6 September 2021 were company holidays at Meta.

this reasoning on the basis that it is inconsistent with the consent letter of the Carve-Out Derogation.

93. The consent letter clearly states that *'From the moment that a [Meta] 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 [IEO] and Meta will promptly inform the CMA, who will add the employee and their direct manager to the list of key staff identified in Annex 1 [to the Carve-Out Derogation].'*
94. The CMA considers the development of Meta's [X] feature to constitute GIF-related Activities (as defined in the Carve-Out Derogation). As a product manager on the [X] project, Ms [A] was, in the CMA's view, a key staff member for the purposes of the IEO. After the Carve Out Derogation was granted, Meta was obliged to promptly inform the CMA of key staff members who began working on Meta's [X] feature, such as Ms [A], and update its list of key staff accordingly.
95. Ms [A]'s notice of intention to leave Meta did not affect her classification as a key member of staff under the IEO, nor mean that Meta's obligations under the IEO which relate to key staff no longer applied to Ms [A].

Our assessment

96. Meta is obliged to seek consent prior to any change made to its key staff and must report any resignation of key staff members to the CMA in line with the requirements of paragraphs 5(i) and 8 of the IEO.
97. Meta failed to seek consent or inform the CMA prior to the departure of Ms [A], even though it was aware of her expected departure at the time it referred to her being a member of key staff. The CMA only learned of her departure three days after she had left.
98. As Ms [A] was a member of key staff, it was incumbent on Meta to actively keep the CMA informed of any material developments relating to Meta, such as the details of her departure. Ms [A]'s manager, skip level manager, and Meta's HR were informed of her intention to leave on 23 August 2021, over 2 weeks before the CMA learned of her resignation. Meta informed the CMA of her departure three days after she left the business.
99. Meta did not inform the CMA that Ms [A] had already provided notice when it identified her as key staff on 1 September 2021. At the time of adding her to the key staff list, Ms [A] had informed Meta of her intention to leave 10 days prior. Meta's compliance statement covering the reporting period of 25 August

to 7 September 2021⁶¹ contained no mention of Ms [A]’s notice of resignation and subsequent departure from Meta. The CMA is therefore of the view that this demonstrates that Meta failed to actively inform the CMA of this material development.

Departure of Mr [B] and assumption of responsibilities by Mr [K]

Facts

100. At the time of granting the Carve-Out Derogation, Mr [B] was [§<] at Meta. Mr [B] was identified as a member of key staff in Annex 1 of the Carve-Out Derogation.
101. On 17 August 2021, Mr [B] informed his line manager, Mr [K], of his intention to leave Meta. On 24 August 2021, Mr [B] discussed the resignation with his HRBP Ms [Q]. Following this discussion, Mr [B] submitted his resignation on Meta’s ‘People Portal’ on 26 August 2021.⁶²
102. Mr [B]’s exit interview took place on 7 September 2021.⁶³
103. On 20 September 2021, Meta informed the CMA by email that Mr [B] had left the employment of Meta on 7 September 2021. Meta stated that the delay in informing the CMA was the result of an ‘*inadvertent miscommunication*’ between Meta’s human resources team and its compliance team. The CMA had not previously been informed that Mr [B] had resigned.
104. In its email, Meta mentioned that Mr [B] had been added to the list of key staff contained in Annex 1 of the Carve-Out Derogation by virtue of his role as manager of Mr [M] ([§<]). Meta noted that as a result of Mr [B]’s departure, Mr [M] would report to Mr [K] ([§<]). Mr [K] was only added to the updated key staff list after Mr [B]’s departure.
105. Mr [B]’s resignation was not mentioned in Meta’s compliance statement dated 23 August (covering the reporting period of 11 August to 24 August 2021), and his subsequent departure was not mentioned in Meta’s compliance statement dated 2 September (covering the reporting period of 25 August to 7 September 2021).

⁶¹ Although this compliance statement was signed on 2 September 2021, Meta was aware of Ms [A]’s planned departure prior to when the compliance statement was signed.

⁶² Response to section 109 Notice dated 25 October 2021, paragraphs 1.2.

⁶³ Response to section 109 Notice dated 25 October 2021, paragraphs 1.5.

Our assessment

106. Meta is obliged to seek consent from the CMA prior to any change made to its key staff and must report any resignation of key staff members to the CMA in line with the requirements of paragraphs 5(i) and 8 of the IEO. Meta did not seek the consent of the CMA nor inform the CMA in advance of the departure of Mr [B].
107. As Mr [B] was a member of key staff, it was incumbent on Meta to actively keep the CMA informed of any material developments relating to Meta, such as the details of Mr [B]’s departure. The CMA only learned of his departure 34 days after he resigned and 21 days after he had departed. Further, Meta’s two compliance statements (which together cover the reporting period of 11 August to 7 September 2021) contained no mention of Mr [B]’s notice of resignation on 17 August and subsequent departure from Meta on 7 September. The CMA is therefore of the view that Meta failed to actively inform the CMA of this material development.

Departure of Mr [C] and assumption of responsibilities by Mr [Z]

Facts

108. Mr [C] was, at the time of granting the Carve-Out Derogation, [X] at Meta. Mr [C] was identified as a member of key staff in Annex 1 to the Carve-Out Derogation.
109. On 7 September 2021, Mr [C] informed his line manager, Mr [Z], of his intention to leave Meta. Mr [C]’s exit interview took place on 13 September 2021. These discussions concerned the logistics of Mr [C]’s departure and the reassignment of his work to other staff.⁶⁴
110. By email dated 22 September 2021, Meta informed the CMA that Mr [C] had departed the employment of Meta on 20 September 2021. Meta explained that the delay in informing the CMA was the result of an ‘*inadvertent miscommunication*’ between Meta’s human resources team and its compliance team. The CMA had not previously been informed that Mr [C] had resigned.
111. In its email dated 22 September 2021, Meta mentioned that Mr [C] was added to the list of key staff contained in Annex 1 of the Carve-Out Derogation by virtue of his role as manager of Mr [F] ([X]). Meta noted that as a result of Mr

⁶⁴ Facebook’s response to the section 109 notice of 13 October 2021 dated 25 October 2021, paragraphs 1.3 and 1.6.

[C]'s departure, Mr [F] would report to Mr [Z] ([§<]). Mr [Z] was only added to the updated key staff list after Mr [C]'s departure.

Our assessment

112. Meta is obliged to seek consent from the CMA prior to any change made to its key staff and must report any resignation by key staff to the CMA in line with the requirements of the IEO. Meta failed to seek the consent of the CMA or inform the CMA in advance of the departure of Mr [C].
113. As Mr [C] was a member of key staff, it was incumbent on Meta to actively keep the CMA informed of any material developments relating to Meta, such as the details of Mr [C]'s departure. The CMA only learned of his departure 13 days after he resigned and 2 days after he had departed. Further, Meta's two compliance statements (which together covered the reporting period of 25 August to 20 September 2021) contained no mention of Mr [C]'s notice of resignation on 7 September and subsequent departure from Meta on 20 September. The CMA is therefore of the view that Meta failed to actively inform the CMA of this material development.

Assessment of Meta's compliance processes

114. Meta submitted that it treats compliance with the IEO with the '*utmost seriousness*' and that it has expended significant time, effort and resources in creating a comprehensive compliance regime which meets and exceeds the measures proposed by the CMA in the revised draft Interim Measures Guidance.⁶⁵ Meta submitted that the extensive nature of its compliance controls to ensure key staff changes were brought to the prompt attention of the CMA is consistent with the '*seriousness with which Meta takes its obligations under the IEO*'.⁶⁶
115. However, as set out in paragraph 77 above, the Monitoring Trustee made recommendations to strengthen Meta's compliance controls. These recommendations addressed future and planned changes and would have mitigated the risk of late notifications occurring. Meta only confirmed to the Monitoring Trustee on 4 October 2021 (ie after the Key Staff Departure Breaches) that it would amend its controls to include future and planned changes.

⁶⁵ Preliminary Letter Response, page 3; Provisional Penalty Decision Response, paragraph 1.16. The revised Interim Measures was published on 21 December 2021: [Interim measures in merger investigations](#).

⁶⁶ Preliminary Letter Response, page 3; Provisional Penalty Decision Response, paragraphs 1.5 and 1.16.

116. The risk of late notifications occurring were legitimate concerns given that, as set out in paragraphs 54 to 70 above, there have been other instances where Meta has only informed the CMA of changes to key staff (or provided complete information of the planned changes) a matter of days before the employee was due to depart the company (and the changes would come into effect). In the cases of Mr [P] and Ms [T], the CMA was unable to assess the key staff changes or grant a derogation prior to their departures because of the late provision of information from Meta. With Mr [N], on 28 May 2021 the CMA noted his imminent departure and requested Meta provide advance notice of urgent actions requiring a derogation, particularly where Meta had been aware of the planned key staff change for some time. Around two weeks after the CMA's email of 28 May 2021, Meta notified the CMA of Mr [J]'s resignation and departure a day before he was due to leave the company. The CMA notes that Meta attributed the delayed notification of Mr [J]'s resignation to an '*inadvertent miscommunication*' between Mr [J]'s team and Meta's compliance team. This is similar to the reason provided for the late notification of the departures of Messrs [B] and [C].
117. In light of these instances, Meta should have promptly considered the efficacy of its compliance controls in line with the Monitoring Trustee's suggestions. Neither the Preliminary Letter Response nor the Provisional Penalty Decision Response provides an explanation as to why the Monitoring Trustee's recommendations were only implemented after the Key Staff Departure Breaches occurred. Each of these instances suggest that Meta's compliance processes had deficiencies which affected its monitoring of key staff who have resigned, and as a result the notification of such resignations to Meta's compliance team (and therefore to the CMA) was unduly delayed.
118. Meta submitted that the Provisional Penalty Decision does not take into account that, prior to the Monitoring Trustee's recommendations, Meta already had controls in place requiring key staff and HR employees to inform its compliance team of actual, future and planned changes (ie C23D and C23F).⁶⁷ However, these controls on their own did not prevent three consecutive instances of key staff members departing Meta before the CMA was aware of their resignations and resulting changes made. As already mentioned, Meta ultimately implemented the Monitoring Trustee's recommendations.
119. On 8 October 2021 the Monitoring Trustee queried with Meta the efficacy of the controls in place at that time regarding the identification of movements in

⁶⁷ Provisional Penalty Decision Response, paragraph 1.17.

key staff following the departures of Messrs [B] and [C]. Meta responded to the Monitoring Trustee as follows:

- (a) the departures should have been caught by controls C23D, C23E and C23F and control C23D was broad enough to also capture the departures, including upcoming changes;
- (b) the delay in notifying the CMA was not a result of any gap or inadequacy in Meta's compliance regime; rather, it was the result of an isolated incident of human error, namely a failure of an individual HRBP to notify Meta's compliance team of a key staff departure;⁶⁸ and
- (c) regarding control C23D, Meta considers that this control is more effectively certified by compliance, as there is no one HR individual who is well-placed to report on possible key staff changes across the entire Meta business. Meta regarded its current practice (compliance liaising with HR managers across its business) to be a more effective solution.

120. Based on the information provided by Meta, the Monitoring Trustee's view was that all three relevant compliance controls (C23D, C23E, and C23F) failed for the following reasons:⁶⁹

- (a) Control C23D failed because Meta's compliance team either did not ask the right questions regarding changes to key staff (for example, asking whether any key staff had resigned, moved jobs, or been promoted) or relied on being given appropriate information by HR (which was not provided);
- (b) Control C23E failed because one or more of Meta's HR individuals failed to notify Meta's compliance team of any changes or Meta's compliance team failed to ask the right questions when contacting the relevant HR individuals before every certification period to verify any changes; and
- (c) Control C23F failed because none of the key staff or their line managers remembered to notify Meta's compliance team of their resignations.

121. The CMA agrees with the Monitoring Trustee's view. The failure of the controls shows that three levels of employees (HR, the resigned staff member, and the line manager) all failed to inform Meta's compliance team. Furthermore, it may also be the case that the controls failed because:

⁶⁸ See also Provisional Penalty Decision Response, paragraph 1.5.

⁶⁹ Monitoring Trustee's email to the CMA dated 17 November 2021.

- (a) Meta's compliance team was either not asking HR questions which would have alerted it to the planned key staff departures in the emails which asked HR employees to verify any changes to key staff, or
 - (b) Meta's compliance team was relying on HR to provide this information by its own volition.
122. Meta also did not implement the Monitoring Trustee's recommendations until after the Key Staff Departure Breaches occurred. The CMA's view is that the timely implementation of the Monitoring Trustee's recommendations would have at least reduced the risk of key staff departures not being reported in a timely manner.
123. Meta does not consider that its compliance programme was defective, nor that it failed in any way. Meta disagrees with the Monitoring Trustee's view for the following reasons:
- (a) Regarding control C23D, Meta submitted that this control requires Meta's HRBPs to confirm there are no planned upcoming changes to key staff, as evidenced by the periodic reminder emails issued by Meta's compliance team to HRBPs responsible for key staff. This email states that key staff changes include '*departures, promotions, and changes of position*'.⁷⁰ Therefore, in Meta's view its controls had been correctly configured to ask the right questions, consistent with the Monitoring Trustee's examples referred to above at paragraph 120(a).
 - (b) Regarding control C23E, Meta disagrees with the conclusion that its compliance team failed to ask the right questions when contacting the relevant HR staff. According to Meta, HRBPs are aware of their requirement to report planned upcoming changes, including resignations, to Meta's compliance team. Any failure of this control is human error, arising because the relevant HR employee forgot to notify the compliance team.⁷¹
 - (c) Regarding control C23F, Meta agrees that none of the key staff or their line managers remembered to notify Meta's compliance team of their resignations as required by this control. As with control C23E, Meta's view is that this was due to incidents of human error by a small number of individuals.⁷²

⁷⁰ Provisional Penalty Decision Response, paragraph 1.18(a); Exhibit [X], page 4.

⁷¹ Provisional Penalty Decision Response, paragraph 1.18(b).

⁷² Provisional Penalty Decision Response, paragraph 1.17 and 1.19.

124. Further details were provided by Meta regarding control C23E.⁷³ In the reporting period of 11 August to 21 September 2021, Meta contacted its HRBPs to verify any key staff changes on 19 August, 2 September, and 17 September 2021. Responses to the 2 September and 17 September emails were due by close of business on the same day, while the 19 August email required a response by close of business the following day. Meta informed the CMA that in circumstances where HRBPs do not respond to their emails, Meta sends reminder emails or carries out manual checks of internal HR records on (among other things) role changes or departures that have occurred in relation to key staff.
125. The CMA has considered Meta's submissions, including the witness statements and supporting exhibits provided by Ms [W] ([§<]) and Ms [Q] ([§<]):
- (a) Ms [W] states in her witness statement that, in her experience, '*HR employees at Meta have a challenging and fast-paced role*'. This is echoed by Ms [Q], who states that she did not notify Meta's compliance team of Messrs [B] and [C]'s departures because she was '*handling a substantial workload*' at the time she became aware of the planned departures. It is unclear why Meta has not adapted its compliance processes to ensure that HR employees have sufficient capacity to carry out their functions effectively, particularly given the importance of monitoring and certifying compliance with the IEO. Indeed, Ms [Q] was not the only person who failed to respond to emails sent by Meta's compliance team: Meta's compliance team needed to send a reminder email after its email of 17 September 2021 after half of the addressees did not initially respond.⁷⁴
- (b) Meta provided an example of a periodic reminder email received by HRBPs which states that '**If there will be changes to either of your roles (departure, promotion, position change), we will need to give the regulator advance notice and the opportunity to approve**' (emphasis in original). However, this does not evidence that Meta's compliance team are asking HRBPs the right questions at the time of certifying IEO compliance. The email requiring HRBPs to certify any key staff changes during each certification period does not set out any of the above reminders, thereby relying on HRBPs to remember the contents of the periodic reminder emails. Particularly in light of the heavy workload of HRBPs (as submitted by Meta) and the short timeframe expected for

⁷³ Following the receipt of the Provisional Penalty Decision Response, the CMA asked further questions to Meta on 20 January 2022. Meta responded to these questions on 24 January 2022.

⁷⁴ Meta's response to the CMA's information request of 20 January 2022 dated 24 January 2022, Annex 4.

responses, it is not clear therefore that such reminder emails would ensure that HRBPs would provide the right information at the relevant time, ie at the time of certifying compliance.

- (c) The CMA notes the efforts of Meta's compliance team to manually check the status of key staff when HRBPs do not respond to their emails. However, according to Meta, this manual check did not pick up the departures of Ms [A], Mr [B], and Mr [C] because '*these individuals had not yet departed Meta*'. This suggests that the manual checks undertaken by Meta's compliance team cannot pick up expected or planned changes to key staff, such as resignations and planned departures but only changes that have already taken place. This represents a gap in Meta's compliance process, as it means that the fail-safe method adopted when HRBPs do not respond to Meta's compliance team does not identify future and planned changes, and therefore is not capable of ensuring timely reporting in order to obtain CMA consent to changes made to key staff **before** these occur. In the case of Mr [B], this resulted in the CMA only learning of his departure 34 days after he resigned and 21 days after he had departed.

126. Meta submitted that its compliance team has required key staff and HR staff to inform the compliance team of any future or planned changes in addition to actual changes since the inception of its compliance programme. Meta's view is that even if it had agreed to update its language in response to the Monitoring Trustee's suggestion, '*this would have done no more than bring it in line with existing practice. It would not have avoided the issue in hand*'.⁷⁵ Meta pointed to an email sent by Meta's HR staff on 22 September 2021 (ie after the Key Staff Departure Breaches) reminding staff of the need to report '*changes before they happen*'. In the email, such changes include '*departures, promotions, changes of position (whether by applying to an internal role, or change of title in current role) and reorgs that change reporting lines to a new manager*'.⁷⁶
127. Given the Monitoring Trustee's conclusion that Meta's compliance team may have failed to ask the right questions, it is unclear why Meta believes that updating the language of its compliance controls would not have at least reduced the risk of key staff departures not being reported in a timely manner. Indeed, prior to receiving the Monitoring Trustee's recommendation, there had

⁷⁵ Preliminary Letter Response, page 4.

⁷⁶ Page 3 of Exhibit [X] refers to an email from Meta's IEO compliance team to Meta employees dated 26 August 2021 (ie before the Key Staff Departure Breaches). However, the CMA notes that this email asks key staff to notify Meta's compliance team of changes to employment or reporting lines, with no reference to planned changes or examples of what constitutes a change.

already been two instances where a key staff change could not be assessed due to Meta's delayed notification to the CMA (Mr [P] and Ms [T]) and one instance where Meta attributed the delayed notification of a key staff resignation (Mr [J]) to an '*inadvertent miscommunication*', which is similar to the circumstances of Messrs [B] and [C]. The CMA also observes that Meta has now updated the language of its compliance controls per the Monitoring Trustee's suggestion.

128. In view of the above, the CMA is of the view that Meta's submissions do not refute the Monitoring Trustee's view regarding its compliance processes. [X]. Furthermore, it appears that Meta has not designed a compliance process which sufficiently accounts for the '*fast-paced*' and '*substantial workload*' faced by its HR employees, despite acknowledging that these stresses have an impact on HRBPs responsible for monitoring key staff. This clearly contributed to the unreported key staff changes. Not only does it appear that Meta's compliance process places an over-reliance on its HR employees (despite instances where HR employees do not initially respond to emails asking to verify key staff changes), Meta's compliance team is also unable to confirm whether there are planned or anticipated key staff changes when it conducts manual HR record checks. The CMA is therefore of the view that Meta's compliance processes had deficiencies which ultimately led to the Key Staff Departure Breaches. However, as set out in the next section and in the sections below on the appropriateness of imposing a penalty and of its level, the CMA has taken into account Meta's submissions in re-assessing the nature of the Key Staff Departure Breaches.

Pattern of behaviour

129. In the October Penalty Decision, the CMA found that Meta's overall compliance with the IEO was particularly concerning because the several instances of contraventions to the IEO (ie Breach 1 (Qualified compliance statements), Breach 2 (Tenor outage) and Breach 3 (Change of roles of key staff)) were symptomatic of the adoption by Meta of a disregard for the requirements of the IEO.⁷⁷
130. In the course of the Merger investigation (and in litigation before the Tribunal and Court of Appeal) Meta repeatedly asserted that unqualified compliance with the IEO would not be possible due to its wide scope, unless and until a derogation was granted to the IEO. As recognised by the Tribunal, to the extent that it considered that a narrower derogation was appropriate, it was incumbent on Meta to engage with the CMA and submit a derogation that was

⁷⁷ October Penalty Decision, paragraphs 298 to 300.

fully specified, reasoned and supported by relevant evidence. Consistent with this judgment, in the October Penalty Decision the CMA found that Meta's approach to compliance was defective and that it had reached decisions that were properly for the CMA.⁷⁸

131. Now, after the granting of the Carve-Out Derogation, there is no room for any level of doubt that Ms [A], Mr [B], and Mr [C] are 'key staff' for the purposes of the IEO because they were all specifically named and added to a key staff list by Meta itself. Monitoring the position of a very limited number of individuals identified as key staff in the Carve-Out Derogation⁷⁹ is clearly not '*practically impossible*'.⁸⁰ And yet, three consecutive instances where Meta's compliance team seemed unaware of the departure of three key staff members occurred. This resulted in three key staff members leaving Meta before the CMA was informed or granted its consent to the key staff changes.
132. In the Provisional Penalty Decision, the CMA provisionally found that such repeated failures to report the resignations of key staff identified by name in the Carve-Out Derogation have no other explanation other than a disregard by Meta (and its staff) to the requirements of the IEO, and that the Key Staff Departure Breaches, in the CMA's provisional view set out in the Provisional Penalty Decision, illustrate an additional (but distinct) manifestation of Meta's disregard to the requirements of the IEO. Breaches 1 and 3 of the October Penalty Decision in particular illustrated (as noted above) a failure by Meta to engage with the interim measures process to narrow down the scope of the IEO and that Meta reached decisions that were properly for the CMA. In particular, the CMA was concerned that Meta had failed to seriously engage with the requirement to put compliance processes in place to monitor changes to key staff.
133. However, having now considered the following information which was provided after the Provisional Penalty Decision was issued⁸¹, the CMA no longer considers the Key Staff Departure Breaches to reflect a disregard by Meta (and its staff) for the requirements of the IEO of a similar nature as the one identified in the context of the October Penalty Decision. In particular, it appears that Meta had put in place some mechanisms to mitigate its reliance on HRBPs:

⁷⁸ October Penalty Decision, paragraph 298.

⁷⁹ At the time of granting the Carve-Out Derogation, there were [X] key staff members identified in Annex 1. A small number of individuals have been added (and removed) since the Carve-Out Derogation was granted.

⁸⁰ See for example Meta's letter to the CMA dated 15 March 2021, pages 5 and 6, and October Penalty Decision, paragraph 96(b).

⁸¹ Meta's Provisional Penalty Decision Response, the supporting witness statements, and Meta's response to the CMA's information request of 20 January 2022.

- (a) While Meta relies heavily on HRBP staff to report planned changes to key staff, some fail-safe checks are in place. Meta's compliance team sends reminder emails to HRBPs who do not respond to its emails regarding changes to key staff. It also conducts manual internal HR record checks when it does not receive a response from HRBPs. Therefore, while it is the CMA's view that Meta's compliance processes, including this fail-safe check, had deficiencies that ultimately led to the Key Staff Departure Breaches (as set out in paragraph 128 above), the CMA acknowledges that Meta's compliance team did take some steps to determine whether there were any changes to the roles of Ms [A], Mr [B], and Mr [C].
- (b) Regarding Ms [A], the CMA recognises that specific circumstances relating to her inclusion on the Key Staff list contributed to the delay in reporting her resignation. Indeed, her addition to the key staff list on 2 September coincided with holidays observed by Meta on 3 and 6 September 2021, resulting in a delay in identifying the relevant HRBP responsible for Ms [A]. Ms [A] alerted Meta of her departure on 7 September 2021, her last day at Meta. While the CMA is of the view that Ms [A]'s employee status (including planned changes) should have been confirmed by Meta at the time she was added to the key staff list (and not after the fact), the CMA acknowledges Meta's mitigating circumstances for not identifying and reporting Ms [A]'s departure earlier.

134. For the avoidance of doubt however, the CMA remains of the view that the Key Departure Breaches involve repeated instances of the same type of failure to comply with the IEO, which in turn reflect deficiencies in Meta's compliance processes.

Assessment of Meta's other submissions on the Key Staff Departure Breaches

135. In this section the CMA sets out its views on further submissions made by Meta in its Preliminary Letter Response and Provisional Penalty Decision Response that, for ease of presentation, have been grouped into the following sections, which are addressed in turn:
- (a) the requirement to seek CMA consent for key staff resignations;
 - (b) the timing of Meta's notifications to the CMA;
 - (c) the key staff resignations are not causally related to the Merger; and
 - (d) the key staff were incentivised to stay at Meta.

(a) *The requirement to seek CMA consent for key staff resignations*

136. Meta submitted that the CMA has failed to consider that the Key Staff Departure Breaches concern resignations, and not planned changes. Therefore, because it has not ‘*made*’ or ‘*procured*’ changes to its key staff, paragraph 5(i) is not engaged.⁸²
137. The CMA disagrees with Meta’s characterisation of whether it has made any changes to its key staff. Paragraph 5(i) of the IEO requires Meta to seek consent for, as opposed to solely report, changes to key staff. The roles and responsibilities of the key staff member who has resigned may be assigned to other employees within the business and/or a replacement to the key staff employees post sourced. A plain English interpretation of the word ‘change’ in paragraph 5(i) of the IEO would clearly encompass assigning these previously allocated responsibilities to a different member of staff.⁸³
138. As set out in paragraphs 90, 104, and 111 above, Meta has made the following changes after the resignation and termination of employment of Ms [A], Mr [B], and Mr [C]:
- (a) Ms [A] was replaced on the [X] project by Mr [L];
 - (b) Mr [B]’s responsibility of managing Mr [M] ([X] and a key staff member) was assigned to Mr [K];
 - (c) Mr [C]’s responsibility of managing Mr [F] ([X] and a key staff member) was assigned to Mr [Z].
139. Furthermore, according to the Provisional Penalty Decision Response, Meta concedes that it took action designed ‘*to ensure that staff’s GIF-related Activities were expeditiously reallocated*’ after the key staff resignations. Meta submitted that, instead of this constituting a breach of the IEO, such ‘*prompt action*’ demonstrated its commitment to the IEO. However, the CMA does not agree with Meta’s characterisation of its actions following the key staff resignations. Meta is under a clear and unambiguous obligation to seek consent from the CMA prior to making changes to key staff.
140. In Meta’s view, it should not be penalised in circumstances where Meta and the CMA disagree on the interpretation of paragraphs 5(i) and 8(a) of the IEO,

⁸² Preliminary Letter Response, page 2; Provisional Penalty Decision Response, paragraph 1.9.

⁸³ Meta submitted that the CMA has not explained how a reallocation of responsibilities amounts to a ‘change’ in key staff for the purposes of the IEO (Provisional Penalty Decision Response, paragraph 1.10). The CMA views this explanation (which was provided in the Provisional Penalty Decision) to be sufficiently clear. As set out in Appendix 1, Meta has previously sought derogations for the re-allocation of responsibilities of key staff who have resigned.

and that these pertinent IEO provisions are '*not clear*'.⁸⁴ Meta submitted that the principle of doubtful penalisation applies, and therefore it should not be penalised upon an ambiguity.⁸⁵

141. The CMA disagrees with the above submission. To the contrary, Meta has demonstrated that it is aware and clearly understands that the Key Staff Departure Breaches are caught by paragraphs 5(i) and 8(a) of the IEO. Meta's awareness of its obligation to inform the CMA and seek its consent is evidenced by the following:

- (a) as set out in paragraphs 54 to 70 above, Meta has on multiple occasions sought a derogation for key staff who have resigned;
- (b) Meta informed the CMA that its HR staff are '*repeatedly reminded to flag key staff changes, including resignations and departures (actual or planned)*' to Meta's compliance team⁸⁶ and that periodic reminder emails received by HR staff make – as stated by Meta in the Provisional Penalty Decision Response - '*abundantly clear*' that key staff changes include resignations and (planned) departures;⁸⁷ and
- (c) the Monitoring Trustee recommended that Meta amend its compliance controls to ensure key staff changes were properly captured and notified to the CMA. This was communicated to Meta prior to when the Key Staff Departure Breaches occurred and was only implemented after the Key Staff Departure Breaches.

(b) The timing of Meta's notifications to the CMA

142. Meta submitted that paragraph 8(a) of the IEO requires Meta to keep the CMA '*actively*' informed of key staff departures and that Meta did so by '*proactively*' informing the CMA. Meta submitted that paragraph 8(a) does not prescribe or require a set time limit within which notifications must be made to the CMA, and that the delays in notifying the CMA of the key staff departures were '*isolated incidents of human errors*' that do not constitute a breach of paragraph 8(a).⁸⁸

143. Meta also submitted that, under US labour laws, employees can leave the Meta business '*at will*' and usually within two weeks.⁸⁹ The Monitoring Trustee

⁸⁴ Provisional Penalty Decision Response, paragraph 1.13.

⁸⁵ Provisional Penalty Decision Response, paragraph 1.15.

⁸⁶ Facebook's response to the section 109 notice of 13 October 2021 dated 25 October 2021, paragraphs 3.1 and 4.1.

⁸⁷ Provisional Penalty Decision Response, paragraph 1.18(a).

⁸⁸ Preliminary Letter Response, page 2; Provisional Penalty Decision Response, paragraph 1.4 and 1.11.

⁸⁹ Preliminary Letter Response, page 2.

has also noted in correspondence with the CMA that notice periods in the US are considerably shorter than in the UK.⁹⁰

144. While the CMA recognises that Meta's compliance team informed the CMA of the Key Staff Departure Breaches soon after it became aware of them, the CMA disagrees with Meta's submission on whether it actively informed the CMA. In determining whether the CMA was '*actively informed*' of material developments, the relevant consideration is the length of time from when the material development occurred to when the CMA was informed of such development. Ms [A], Mr [B], and Mr [C] each informed their respective line manager of their intention to leave Meta at least two weeks before the CMA was informed of their departure. Significantly, at least one member of Meta's HR team was aware of Ms [A]'s and Mr [B]'s resignation and planned departure for more than two weeks before the CMA was made aware. In view of Meta's obligation to seek consent prior to making any changes to key staff, the CMA should have been notified of planned departures before each key staff member left Meta.
145. Meta submitted that the CMA's reference to Meta's obligation under paragraph 5(i) of the IEO to seek consent prior to making any changes to key staff in the context of paragraph 8(a) of the IEO '*erroneously elided*' two different provisions of the IEO. Meta submitted that paragraph 5(i) does not require the resignations of Meta's key staff to be approved by the CMA.⁹¹
146. As set out in paragraphs 138 to 139 above, the CMA has set out the changes which occurred as a result of the three key staff resignations. Indeed, Meta itself has submitted that '*staff's GIF-related Activities were expeditiously reallocated*'.⁹² Each line manager of the three resigning key staff were informed of their intention to leave Meta at least two weeks before the CMA was made aware of their departure. Because of Meta's obligation under paragraph 5(i) to seek consent for changes to key staff, including how their functions are reallocated, this necessarily means the CMA should have been notified of the resignation of the key staff (ie the material development). The CMA should have been notified as soon as possible after each key staff member resigned, and certainly before they departed Meta and their functions were reallocated to other employees. The inclusion of Ms [A] and Messrs [B] and [C] in the list of key staff for the purposes of the Carve-Out Derogation reflects the importance of these three individuals to Meta (in the context of the Merger investigation), and of ensuring that the CMA remains aware of their departure and any changes made to their role. Such derogation requests

⁹⁰ Monitoring Trustee's email to the CMA, dated 17 November 2021.

⁹¹ Provisional Penalty Decision Response, paragraph 1.11.

⁹² Provisional Penalty Decision Response, paragraph 1.10.

must be made before changes are made, which in this case was when the key staff member departed Meta and another employee assumed their responsibilities.

147. The CMA also notes that under paragraph 7 of the IEO, Meta is required to submit periodic statements of compliance to the CMA on a fortnightly basis. Paragraph 2(j) of the IEO compliance statement places an obligation on the Chief Compliance Officer to confirm that no changes have been made to the Meta business. It was incumbent on Meta to inform the CMA within that reporting period whether such changes have occurred. As a result, it is relevant that:
- (a) Meta provided three compliance statements to the CMA certifying that, in the reporting period of 11 August to 21 September 2021, no changes were made to key staff of the Meta business (paragraph 2(j) of the compliance statements).⁹³
 - (b) Two of these compliance statements (which together covered the reporting period of 11 August to 7 September 2021) contained no mention of Ms [A]’s notice of resignation on 23 August 2021 and subsequent departure from Meta on 7 September 2021;
 - (c) Two of these compliance statements (which together covered the reporting period of 11 August to 7 September 2021) contained no mention of Mr [B]’s notice of resignation on 17 August 2021 and subsequent departure from Meta on 7 September 2021; and
 - (d) Two of these compliance statements (which together covered the reporting period of 25 August to 21 September 2021) contained no mention of Mr [C]’s notice of resignation on 7 September 2021 and subsequent departure from Meta on 20 September 2021.
148. The departures of Ms [A] and Messrs [B] and [C] should have been captured in each of the compliance statements identified above. Meta submitted that the submission of these compliance statements does not mean it did not proactively inform the CMA of the departures. However, the CMA views the fact that two compliance statements were submitted by Meta between the time from when each key staff resignation occurred to when the CMA was informed of the development further demonstrates that Meta did not actively

⁹³ Compliance statement for Facebook / Tabby Acquisition / Facebook UK dated 23 August 2021 (covering the reporting period of 11 August to 24 August 2021), compliance statement for Facebook / Tabby Acquisition / Facebook UK dated 2 September 2021 (covering the reporting period of 25 August to 7 September 2021) and compliance statement for Facebook / Tabby Acquisition / Facebook UK dated 20 September 2021 (covering the reporting period of 8 September to 21 September 2021).

keep the CMA informed of these key staff members' resignation and subsequent departure.

149. Meta submitted that the CMA should account for the fact that Meta has no ability to prevent employees from resigning and departing the company.⁹⁴ Although it is for an individual to decide whether to tender their resignation, this does not affect Meta's obligation to notify the CMA of important details such as the resignations tendered by key staff, the details of the planned departure, and any changes resulting from the departure. As set out in paragraph 50 above, Meta stated that it would inform the CMA of voluntary departures and proposed changes in its Updated COD Request.

(c) The key staff resignations are not causally related to the Merger

150. Meta submitted that the Court of Appeal clarified that the CMA's interim measures powers were available for the purpose of '*regulat[ing] any activity which the merging parties might take in connection with or as a result of the merger that had the potential to affect the competitive structure of the market during the CMA's investigation*' (emphasis added by Meta).⁹⁵ Meta submitted that the Preliminary Letter and Provisional Penalty Decision failed to explain how the changes to key staff identified in this decision were taken '*in connection with or as a result of the merger*' and that simply by virtue of the individuals being included on the key staff list did not make their departures '*merger specific*'.⁹⁶ Meta submitted that merger-specific changes could include for example the redundancy of staff as part of cost saving synergies in view of future or actual integration between merging parties, but that it should not stretch to '*ordinary course resignations, which manifestly have nothing to do with the [Merger] and cannot conceivably result in pre-emptive action*'.⁹⁷
151. Meta submitted the Merger does not involve a merger of equals such that Meta staff considered their jobs to be at risk as a result of cost saving synergies. It is also not the case that the key staff in question left Meta as a result of concerns over their employment prospects at Meta given the Merger transaction. Accordingly, Meta submitted, the requirement that there be no 'changes to key staff' must be reasonably interpreted as capturing merger-specific proactive changes that occur as a result of actual or planned integration. Meta submitted this construction is consistent with the Court of Appeal's '*clarification*'.⁹⁸

⁹⁴ Preliminary Letter Response, page 2.

⁹⁵ Preliminary Letter Response, page 4.

⁹⁶ Provisional Penalty Decision Response, paragraph 1.22.

⁹⁷ Preliminary Letter Response, page 5; Provisional Penalty Decision Response, paragraph 1.22.

⁹⁸ Preliminary Letter Response, page 6.

152. The CMA does not agree that the Court of Appeal clarified the meaning of section 72(8) of the EA02 in the manner submitted by Meta, nor does it consider that the Court of Appeal's findings on the proper interpretation of section 72 of the EA02 provide Meta with a reasonable excuse for non-compliance with the IEO.
153. In *Facebook v CMA*, Meta asserted that the definition of 'pre-emptive action' is 'essentially grounded exclusively in the question of remedies'. The CMA disagrees with this interpretation. In the CMA's consistent view, the concept of 'pre-emptive action' is broader than this, encompassing both action that might prejudice the reference or impede the taking of any remedial action. However, it was never in dispute that section 72 of the EA02 applies to conduct that may be taken in connection with or as a result of the merger.⁹⁹
154. At paragraph 124 of its judgment, the Tribunal rejected Meta's interpretation of section 72 of the EA02 and endorsed the CMA's approach:

'In the Tribunal's view, the statutory purpose of s.72 EA02 is wider than the Applicants have contended. The definition of pre-emptive action is not grounded exclusively in the question of remedies. It includes action which might prejudice a Phase 2 reference. As the CMA submitted, this includes action that has the potential to affect the competitive structure of the market during the CMA's investigation. This is supported by the Tribunal's jurisprudence, which is clear that pre-emptive action is a broad concept and includes the possibility of prejudice to the reference or an impediment to justified action: ICE at [220]. The use of "might" in the definition implies a relatively low threshold of expectation because the CMA is at a stage of its investigation where it necessarily cannot be sure whether any action being taken or proposed to be taken by the merging parties will ultimately impede any action being taken by the CMA as a result of the Phase 2 reference: Stericycle at [129]'

155. The Court of Appeal recognised (at paragraph 52 of its judgment) that:

'In [124] the Tribunal focused on the first limb of the definition, namely "action which might prejudice the reference concerned" in order to rebut Facebook's argument that the definition was only about action that might impede the remedy of divestiture. It reasoned that this first limb included "action that has the potential to affect the competitive structure of the market during the CMA's

⁹⁹ The CMA has at no point, including in its Provisional Penalty Decision, stated that its interim measures powers are 'limited to' the purpose of regulating conduct that may be taken in connection with or as a result of the merger, as suggested by Meta in the Provisional Penalty Decision Response. As previously stated to Meta in the Provisional Penalty Decision and the October Penalty Decision, the CMA does not agree with Meta's interpretation of the Court of Appeal's judgment in *Facebook v CMA (CoA)*, and Meta cannot rely on its own incorrect interpretation of the EA02 as the basis for a reasonable excuse for non-compliance with the IEO.

investigation”, referring to ICE at [220] where it was indeed made clear that pre-emptive action is a broad concept and includes the possibility of prejudice to the reference or an impediment to justified action. In [124], the Tribunal then highlighted the use of the word “might” in the definition as implying a relatively low threshold of expectation because the CMA is at a stage of its investigation where it cannot be sure about the effects of actions by the merging parties.’

156. Paragraph 56 of the Court of Appeal’s judgment states that:

‘...the Tribunal was right to say (as it effectively did) that the CMA had power to regulate any activity which the merging parties might take in connection with or as a result of the merger that had the potential to affect the competitive structure of the market during the CMA’s investigation.’

157. There was, therefore, no ‘narrowing’ of the legal interpretation of section 72 of the EA02 by the Court of Appeal. Rather, the Court of Appeal recognised, following submissions by Counsel for the CMA, that in its judgment the Tribunal was referring to harm in connection with or as a result of the merger – that was the context in which paragraph 124 of the Tribunal’s judgment arose.¹⁰⁰ Counsel for the CMA made clear that paragraph 124 of the Tribunal’s judgment did not require amending to relate specifically to the merger, as the statutory language used in section 72 of the EA02 is ‘prejudice to the reference’, such that it must obviously relate to the merger.

158. Accordingly, there was no shift in the legal interpretation of section 72 of the EA02 before the Court of Appeal. The Court of Appeal affirmed that the position had always been that the CMA could regulate any activity the merging parties might take in connection with, or as a result of, the merger that had potential to affect the competitive structure of the market during the merger investigation based on the statutory language used in section 72 of the EA02, as reflected in the Tribunal’s judgment.

159. Ms [A] and Messrs [B] and [C] were specifically listed as key staff in Annex 1 to the Carve-Out Derogation.¹⁰¹ Changes to their roles cannot be described as ‘*unrelated*’ to the Merger; had the CMA been informed of the resignations of Ms [A] and Messrs [B] and [C] and the details of their departure from the employment of Meta, the CMA would have considered this in assessing whether to grant a derogation from the IEO. Section 72 of the EA02 necessarily relates to the potential impact of the action, not the subjective

¹⁰⁰ See Court of Appeal proceedings transcript day 2, page 30, in Facebook v CMA (CoA).

¹⁰¹ Ms [A] was added to the key staff list on 1 September 2021. Messrs [B] and [C] were on the key staff list when the Carve-Out Derogation was granted on 29 June 2021.

intention behind the action. The IEO is designed to prevent pre-emptive action and the obligations set out in the IEO are clear. The Court of Appeal confirmed that the requirements of section 72 of the EA02 were satisfied by the IEO in paragraph 55 of its judgment:

‘[The] formulation in section 72(2) is undoubtedly broad enough to encompass the terms of the template Initial Enforcement Order imposed in this case, as was acknowledged by Facebook’s failure to challenge its legality.’

160. In any event, Meta was placed under a strict obligation pursuant to paragraph 5(i) of the IEO to seek consent for the change of any key staff. As set out by the Tribunal in *Facebook v CMA*, it is not for Meta to form judgements or reach decisions that are properly for the CMA.¹⁰² Moreover, Meta cannot rely on its own incorrect interpretation of the EA02 as the basis for a reasonable excuse for non-compliance with the IEO.
161. The CMA notes that on previous occasions, Meta had sought derogations in advance of making changes to key staff (see paragraphs 54 to 70 above). In the CMA’s view, Meta was fully aware of its obligations under paragraph 5(i) of the IEO.

(d) The key staff were incentivised to stay

162. Meta submitted that the resignation of a member of key staff, where they are adequately incentivised, cannot reasonably constitute a breach of the IEO.¹⁰³ Meta pointed to the fact that the individuals in question had left to pursue alternative career opportunities in a dynamic labour market in the United States.¹⁰⁴
163. According to Meta, each of Ms [A], Mr [B] and Mr [C] were well compensated at Meta and left behind *‘[§<] to pursue their career changes’* and that Meta considered it to be *‘disproportionate and unreasonable to penalise it in circumstances where it took all necessary action to ensure that the relevant Key Staff were sufficiently incentivised to remain at [Meta]... [Meta] took all “reasonable steps” to encourage the relevant Key Staff to remain’*.¹⁰⁵
164. Meta further submitted that it had no ability to prevent the members of staff from leaving the Meta business, and that the departures can occur ‘at will’ under United States labour laws and usually within 2 weeks. As such, the requirement for it to obtain CMA consent for non-merger specific unilateral

¹⁰² *Facebook v CMA*, paragraph 158; see also [Electro Rent](#) at paragraph 206.

¹⁰³ Provisional Penalty Decision Response, paragraph 1.4 and 1.8.

¹⁰⁴ Preliminary Letter Response, page 2; Provisional Penalty Decision Response, paragraph 1.8.

¹⁰⁵ Preliminary Letter Response, pages 5 and 6.

resignations (which it cannot control) in circumstances where the relevant individuals were sufficiently incentivised to stay with Meta is at '*fundamental odds with the commercial reality of employment changes and labour mobility at companies like [Meta]*.'¹⁰⁶

165. While the CMA recognises that Meta cannot prevent otherwise well-incentivised key staff to remain in its business in a competitive, dynamic labour market, Meta can and must inform the CMA when key staff have resigned before they depart the business and seek derogations in relation to the changes made to key staff as a result. The changes which Meta makes because of a key staff departure are entirely within Meta's control. Where the CMA has been informed that Meta key staff have resigned and needs to consider whether there is a risk of pre-emptive action, the CMA does not only take into account the steps taken by Meta to encourage key staff to remain at Meta. The CMA also has regard to other aspects such as the nature of the departure, the suitability and the capacity of the person assuming the role prior to the change, and any other safeguards that should be put in place to prevent pre-emptive actions. Furthermore, Meta itself stated in its Updated COD Request that it would inform the CMA of voluntary departures of key staff.¹⁰⁷ The CMA therefore disagrees with Meta's submission that this is at odds with '*the commercial reality*' of Meta's operations.

Decision on the failures to comply

166. In view of the above, the CMA has reached the view that
- i. the departure of Ms [A] and assumption of responsibilities by [L];
 - ii. the departure of Mr [B] and assumption of responsibilities by Mr [K];
and
 - iii. the departure of Mr [C] and assumption of responsibilities by Mr [Z];
- are each:
- (a) a change made to the key staff of the Meta business without obtaining the CMA's prior consent which amounts to a failure to comply with paragraph 5(i) of the IEO, and

¹⁰⁶ Preliminary Letter Response, page 6; Provisional Penalty Decision Response, paragraph 1.9.

¹⁰⁷ See paragraph 50 above.

- (b) a failure to actively inform the CMA of the details of a resignation and departure of key staff which amounts to a failure to comply with paragraph 8(a) of the IEO.

Risk of prejudice to a reference or of impeding remedial action

167. Meta submitted that the CMA cannot reasonably rely on information asymmetry and a precautionary approach as a basis for finding that the departure of key staff might result in pre-emptive action. The CMA's remedies package in its Final Report does not require any Meta personnel or assets to transfer with the Giphy business to a suitable purchaser, therefore any concerns must relate to the competitive structure of the market. Furthermore, Meta submitted that the CMA has not set out how the Key Staff Departure Breaches resulted in harm to the competitive structure of the market, nor how it had the potential to do so, and that the Key Staff Departure Breaches cannot constitute a breach of the IEO absent such an explanation.¹⁰⁸
168. The precautionary purpose of the IEO seeks to protect against the *possibility or risk* of prejudice to the reference or potential remedies. It follows that the CMA need not show actual adverse effects on the competitive structure of the market or on its ability to take remedial action. The purpose of interim measures is to ensure merging parties seek the consent of the CMA before undertaking actions that *might* prejudice the reference or impede the taking of remedial action. A risk of adverse effects is therefore sufficient.¹⁰⁹
169. Furthermore, the Merger investigation was still ongoing at the time of the Key Staff Departure Breaches and the breaches occurred before the Remedies Working Paper was provided to the Parties. The effect of the failure to notify the CMA of the resignation and the date that the key staff's employment with Meta was terminated, and of any action taken by Meta following such departure (including reallocation of responsibilities within Meta), was that the CMA was not in a position to assess whether these changes may prejudice the reference or impede remedial action. There was an obligation upon Meta to notify the CMA in accordance with the IEO. The CMA was therefore unable to assess the nature of the departure, any steps taken by Meta to encourage key staff to remain at Meta, the suitability and the capacity of the person assuming the role prior to the change, and any other safeguards that should be put in place to prevent pre-emptive actions. This had the effect of limiting the CMA's awareness of material developments within the businesses under investigation and in turn prejudiced the CMA's ability to carry out an important

¹⁰⁸ Provisional Penalty Decision Response, paragraph 1.6, 1.21, and 1.23.

¹⁰⁹ *Electro Rent v CMA* at paragraph 200.

statutory function under the UK mergers regime – namely to monitor, and as the case may be enforce, compliance with interim measures in order to prevent pre-emptive action.

170. With respect to Ms [A], Meta accepted that the [X] project falls within the definition of GIF-related Activities under the IEO. However, Meta submitted that the [X] feature is unrelated to the relevant markets set out by the CMA in the provisional findings of the phase 2 Merger investigation, and therefore it is unclear how any staff change relating to the [X] project could conceivably result in pre-emptive action.¹¹⁰
171. It is not for Meta to decide or predict whether there may be any prejudice in circumstances where the Merger is still being investigated by the CMA. Even in circumstances where the CMA may eventually conclude that there was no actual adverse effect, it is not for Meta to unilaterally determine the appropriate scope of the IEO, or whether its actions might prejudice the reference or impede the taking of remedial action.
172. In any event, Meta was well aware of its obligations under the IEO to seek consent prior to any key staff change by submitting a derogation request, and to ensure that the CMA was aware of their departure and changes made to their role (see paragraph 141 above).
173. On that basis, the CMA is of the view that Meta's conduct risked prejudicing the reference or impeding action justified by the CMA's decisions on the reference.

Failure to comply without reasonable excuse

174. Section 94A(1) of the EA02 provides that penalties can only be imposed if a failure to comply is '*without reasonable excuse*'. The CMA notes that the EA02 does not define 'reasonable excuse'.

175. The CMA's Penalties Guidance states:¹¹¹

'The circumstances that constitute a reasonable excuse are not fixed and the CMA will consider whether any reasons for failure to comply amount to a reasonable excuse on a case-by-case basis. However, the CMA will consider whether a significant and genuinely unforeseeable or unusual event and/or an event beyond [the person's] control has caused the failure and the failure would not otherwise have taken place.'

¹¹⁰ Preliminary Letter Response, page 5.

¹¹¹ Penalties Guidance, paragraph 4.4.

176. More generally, once a breach of an IEO has been established, the person who has committed the breach bears the evidential burden of setting out a case for reasonable excuse. Any excuse must be objectively reasonable. The CMA will consider any arguments put forward as to reasonable excuse on the facts of the case.
177. In *Electro Rent*, the Tribunal found that, in the context of assessing whether Electro Rent had a reasonable excuse for breaching the interim order by serving a lease break notice, it was irrelevant whether or not Electro Rent had good commercial reasons for having done so.¹¹² The Tribunal also rejected Electro Rent's argument that its engagement with the monitoring trustee pre-breach constituted a reasonable excuse. The Tribunal did so partly on the basis that Electro Rent had failed to properly brief the monitoring trustee and partly on the basis that, in circumstances in which only the CMA could decide what was a breach of the interim order requiring consent or derogation, it was insufficient to merely notify the monitoring trustee of a possible breach.¹¹³
178. In the Preliminary Letter Response, Meta did not make specific arguments that it had a reasonable excuse for failing to comply with the IEO. Rather, it stated that the Key Staff Departure Breaches could not be '*reasonably deemed to constitute a breach of its obligations under the IEO*' and submitted that the late notifications of the departures of key staff were the result of '*isolated incidents of human error*'.¹¹⁴
179. The CMA has carefully considered Meta's submissions on its failure to comply with the IEO and finds there to be no reasonable excuse not to comply with the IEO. The factors which Meta has submitted caused the failure to notify the CMA of the departures of key staff were all within the control of Meta. Any internal breakdown in control mechanisms or miscommunication between internal departments of Meta on more than once occasion is not something which the CMA avers can be construed as a reasonable excuse.
180. Accordingly, the CMA has concluded that Meta had no reasonable excuse for failing to comply with the requirements of the IEO which have been identified above. Accordingly, the CMA has considered imposing a penalty of such fixed amount as it considers appropriate (section 94A of the EA02).

¹¹² *Electro Rent*, paragraphs 114, 138 and 139.

¹¹³ *Electro Rent*, paragraphs 155 to 157 and 159 to 164.

¹¹⁴ Preliminary Letter Response, pages 2 and 6.

E. Appropriateness of imposing a penalty and of the amount of the penalty imposed

Policy objectives of the penalty – preventing actions which might prejudice any reference and deterrence

181. The CMA considers that it is of utmost importance to the UK's voluntary, non-suspensory regime that interim measures should be effective, particularly in the small number of completed mergers which the CMA identifies as warranting review.¹¹⁵ Their function is to prevent conduct that might prejudice a reference or impede action justified by the CMA's final decision. The purpose of an IEO, as noted by the Tribunal, is precautionary, guarding against the possibility of pre-emptive action.¹¹⁶ It is also incumbent on parties to provide full and accurate information to the CMA and any appointed monitoring trustee throughout the investigation particularly if they identify risks as to their activities pursuant to the IEO and any related derogations.
182. It is important that parties take such obligations to comply seriously, recognising the importance of conducting their business within the parameters of any IEO, and exercise due care and attention over any activities that might be permitted under a derogation, to ensure they do not engage in a breach, whether inadvertently or otherwise.
183. The above is reflected in the policy objectives set out in the Penalties Guidance:¹¹⁷

'Use of the CMA's investigatory and interim measures powers is therefore intended to:

(...)

- prevent action which might prejudice any reference, impede the taking of action following a reference, or cause detrimental and irreversible changes to market dynamics, and*
- ensure that the threat of penalties will deter future non-compliance with relevant CMA powers, by those on whom penalties have been imposed and other persons who may be considering future non-compliance.'*

¹¹⁵ Completed mergers make integration more likely, which may need to be reversed or unwound in order to maintain the independence of the separate businesses. In addition, there is a higher risk that customers, competitors and suppliers perceive businesses under common ownership to be a single entity, rather than two separate entities that have not yet merged.

¹¹⁶ *Intercontinental Exchange* at paragraph 220.

¹¹⁷ Penalties Guidance, paragraph 3.1.

184. The CMA notes that in *Electro Rent*, the Tribunal held that ‘it was appropriate to set the penalty at a level that would bring home to *Electro Rent*, and to other parties involved in a merger investigation, that it is of the utmost importance that interim orders be scrupulously complied with, and that a party should not itself form judgments or reach decisions that are properly for the CMA. This is so, whatever the intentions or incentives of the party involved.’¹¹⁸ The CMA subsequently issued revised guidance on interim measures, stating that ‘given the importance of Interim Measures to the functioning of the regime, the CMA will not hesitate to make full use of its fining powers. The CMA will therefore impose proportionately larger penalties in future cases should this prove necessary in the interests of deterrence.’¹¹⁹
185. Financial penalties perform an important function in signalling the unacceptability of commercial practices by merging parties that contravene the CMA’s interim measures, and the serious potential consequences of engaging in such practices. It is therefore imperative that the CMA set the penalty at a level that reflects the seriousness of the failure to comply with interim measures, and is effective in achieving deterrence.¹²⁰

Appropriateness of imposing a penalty

186. Having had regard to its statutory duties and the Penalties Guidance, and having considered all relevant facts and submissions of Meta, the CMA has decided that the imposition of a penalty in the present case is appropriate.
187. In reaching this view, the CMA has had regard to the policy objectives set out above (in particular the need to achieve deterrence), as well as the factors influencing a decision to impose a penalty as set out in the Penalties Guidance.¹²¹
188. As set out below, the CMA has concluded that imposing a penalty for the Key Staff Departure Breaches is appropriate given:
- (a) the serious and flagrant nature of the repeated breaches; and

¹¹⁸ *Electro Rent*, at paragraph 206. In doing so, it rejected *Electro Rent*’s submission that setting the penalty at such a level was not appropriate because the breach was inadvertent and because *Electro Rent* had approached the monitoring trustee in advance and had taken steps to rectify the breach.

¹¹⁹ Interim Measures Guidance, at paragraph 7.8.

¹²⁰ There are two aspects to deterrence: first, the need to deter the undertaking which is subject to the penalty decision from engaging in future contravention of interim measures (recidivism), and second, the need to deter other undertakings which might be involved in future merger investigations. Any penalty that is too low to deter an undertaking which has contravened interim measures is also unlikely to deter other undertakings.

¹²¹ See paragraphs 4.2 and 4.3.

- (b) the adverse impact that the breaches have had upon the CMA's ability to monitor, and as the case may be, enforce compliance with interim measures.

Serious and flagrant nature of the failure to comply with the IEO

189. The CMA has concluded that each of the Key Staff Departure Breaches was a particularly flagrant failure to comply with the IEO by Meta:

- (a) Meta was under a clear and unambiguous obligation to seek consent prior to changes to key staff and to actively inform the CMA of the details of staff who leave Meta. There was no ambiguity regarding whether Ms [A] and Messrs [B] and [C] were key staff, as all three employees were identified by Meta as key staff and specifically added to a defined and agreed list of a limited number of key staff;
- (b) Meta has stated that '*HR individuals who are responsible for key staff are repeatedly reminded to flag key staff changes, including resignations and departures (actual or planned)*' to its compliance team.¹²² Furthermore, key staff and their line managers should inform Meta's compliance team of any changes to the key staff member's role. The CMA notes that the line managers of Messrs [B] and [C] were also on the key staff list and therefore would have been equally aware of these obligations as they also applied to themselves; and
- (c) Meta was aware that it was required to seek consent from the CMA where key staff changes arise due to staff resignations.¹²³ Meta was previously warned to inform the CMA of planned changes¹²⁴ and received recommendations from the Monitoring Trustee to amend its compliance controls to avoid late notifications of key staff changes from arising.¹²⁵ Meta was also aware from the CMA's letter dated 2 July 2021 that the CMA considered that a failure to notify the CMA of a change to key staff may constitute a breach of the IEO.¹²⁶ All of these events occurred prior to the Key Staff Departure Breaches.

190. Therefore, in the CMA's view, and for the reasons set out above, Meta must have been aware, could not have been unaware, or at the very least ought to have known, that it was under an obligation to seek consent from the CMA of

¹²² Response to section 109 Notice dated 25 October 2021, paragraphs 3.1.

¹²³ See paragraphs 54 to 70 above.

¹²⁴ Set out in paragraph 66 above.

¹²⁵ Set out in paragraph 77 above.

¹²⁶ Prior to issuing the October Penalty Decision, on 2 July 2021, the CMA by letter to Meta set out its initial concerns in relation to the suspected failures to comply with the terms of the IEO, and Meta's conduct and approach to IEO compliance.

changes to key staff and to keep the CMA actively informed of material developments in a timely manner, so as to ensure that the CMA be in a position to consider such changes and where safeguards should have been put in place before these changes materialised.

191. Regarding the seriousness of the breaches, as mentioned in paragraph 189(a) above, the Key Staff Departure Breaches relate to three individuals that had been identified by name because of their relevance to GIF-related Activities (ie activities directly relevant to the Merger).¹²⁷ The CMA engaged extensively with Meta to gather information about the relevant businesses with a view to narrowing down the scope of the IEO through the Carve-Out Derogation (see paragraphs 45 to 52 above). These discussions occurred in circumstances where Meta repeatedly asserted that unqualified compliance with the IEO would not be possible due to its wide scope, unless and until a derogation was granted to the IEO, and submitted that a list of key staff members was *'the most practical way forward'*.¹²⁸ Having been through this assessment and identified a very limited number of individuals as key staff, the CMA considers that Meta should have been closely monitoring the position of those individuals, including by implementing the Monitoring Trustee's recommendation regarding the language of four of the compliance controls (see paragraphs 73 to 78 above).
192. In view of the above, the CMA finds that each of the Key Staff Departure Breaches identified in this decision are sufficiently serious and flagrant to warrant a penalty.
193. Meta submitted that it is unreasonable for the CMA to characterise *'limited incidents of human error'* as serious and flagrant breaches, particularly in circumstances where Meta's compliance team alerted the CMA to the three key staff departures as soon as they were made aware.¹²⁹
194. However, the CMA's view that Meta's failure to comply with the IEO is serious (and that imposing a penalty is appropriate in this case) is strengthened by its assessment of Meta's approach to compliance. As set out above at paragraphs 114 to 128:
- (a) The seriousness of the breaches is magnified by the fact that they involved three consecutive instances of key staff members departing Meta (and other employees assumed the departing employee's responsibilities)

¹²⁷ Although the CMA notes that Messrs [B] and [C] were added to the key staff list because they were line managers of a staff member engaged in GIF-related Activities, rather than because they themselves engaged in such activities.

¹²⁸ See for example Meta's letter to the CMA dated 15 March 2021, pages 5 and 6, and October Penalty Decision, paragraph 96(b).

¹²⁹ Provisional Penalty Decision Response, paragraph 1.19.

before the CMA was informed or granted its consent to the key staff changes.

- (b) Meta's compliance processes had deficiencies which ultimately led to the Key Staff Departure Breaches (as set out in paragraphs 125 to 128). Relevant individuals within Meta failed to apply the compliance processes scrupulously by not reporting material information to Meta's compliance team. This was compounded by a compliance process which placed an over-reliance on its HR employees (who, as submitted in the first witness statement of Ms [W], have a '*challenging and fast-paced role*') and did not contain a sufficiently robust fail-safe method which could identify or monitor planned and anticipated changes of key staff in a timely manner (instead only checking for changes to key staff when it was too late in the process to obtain the CMA's consent as required by the IEO).
- (c) The CMA's concerns relating to Meta's failure to implement robust processes are corroborated by the instances set out in paragraphs 54 to 70 above: Meta only informed the CMA of changes to key staff (or provided complete information of the planned changes) a matter of days before the employee was due to depart the company (and the changes would come into effect). In one of these instances, Meta attributed the delayed notification to the CMA of Mr [J]'s resignation to an '*inadvertent miscommunication*'. This is similar to the reason for the late notification of the departures of Messrs [B] and [C].
- (d) Even though the Monitoring Trustee made recommendations to strengthen Meta's compliance controls, these were only implemented by Meta after the three key staff members left the company.

Adverse impact on the CMA's investigation – risk of prejudice to the reference

195. The inclusion of Ms [A] and Messrs [B] and [C] in the list of key staff for the purposes of the Carve-Out Derogation reflects the importance of these three individuals to Meta (in the context of the Merger investigation), and of ensuring that the CMA remains aware of their departure and changes made to their role. Where Meta has previously sought consent for staff resignations, the CMA has obtained the necessary information to ensure that the risk of pre-emptive action is low and appropriate safeguards are in place. Accordingly, Meta is responsible for ensuring that it has in place compliance mechanisms that are effective in reporting such changes to the CMA in a timely manner, and in any event before the departure of a key staff member occurs.

196. As a result of the breaches identified in this decision, the CMA was not in a position to decide whether to grant consent to the changes to key staff before these were implemented as per the IEO, or whether to require that safeguards be put in place by Meta to prevent any adverse effect to the Merger inquiry. Meta's failure to seek consent or notify the CMA prior to the departure of three key staff members has therefore prejudiced the CMA's ability to perform an important aspect of its statutory functions.

Conclusion on the appropriateness of imposing a penalty

197. In view of the above, the CMA has found that it is appropriate to impose a penalty in relation to the breaches given:

- (a) the serious and flagrant nature of these repeated failures to comply with the IEO; and
- (b) the adverse impact of these failures to comply with the CMA's ability to monitor, and (as the case may be) enforce, compliance with interim measures.

198. The CMA considered that the other factors relevant to the appropriateness of imposing a penalty listed in the Penalties Guidance at paragraph 4.21¹³⁰ did not affect this conclusion.

Appropriateness of the amount of the penalty

199. Consistent with its statutory duties and the Penalties Guidance,¹³¹ the CMA has assessed all relevant circumstances in the round to determine an appropriate level of penalty for the breaches, including the considerations set out above:

- (a) the fact that each breach is serious and flagrant for the reasons set out at paragraphs 189 to 194 above; and
- (b) the adverse impact this failure to comply has on the CMA's ability to monitor, and (as the case may be) enforce compliance with interim measures.

200. In the Provisional Penalty Decision, the CMA provisionally concluded a penalty of £5 million was appropriate. Following the receipt of the Provisional

¹³⁰ Namely the need to achieve swift compliance in the context of this investigation (the CMA considers that general and specific deterrence in relation to future cases are more relevant) or any benefit accrued to Meta (this consideration is addressed in the next section regarding the determination of the penalty amounts).

¹³¹ Penalties Guidance, paragraph 4.11.

Penalty Decision Response, the supporting witness statements, and Meta's response to the CMA's information request of 20 January 2022, the CMA has decided to impose a lower penalty in light of new evidence received. This is mainly to reflect the fact that, whilst the failure to comply without reasonable excuse is serious and flagrant so as to warrant a penalty, the CMA no longer considers the Key Staff Departure Breaches to reflect a disregard by Meta (and its staff) for the requirements of the IEO of a similar nature as the one identified in the context of the October Penalty Decision (see paragraphs 129 to 134). As noted in paragraphs 114 to 131 and 194, the Key Staff Departure Breaches are repeated failures to comply with an IEO:

- (a) The Key Staff Departure Breaches were consecutive instances of key staff members departing Meta (and other employees assumed the departing employee's responsibilities) before the CMA was informed or granted its consent to the key staff changes;
- (b) Indeed, the Key Staff Departure Breaches occurred not only after the CMA granted the Carve-Out Derogation and included a limited number of individuals in the list of key staff, but also after the Monitoring Trustee provided recommendations designed to mitigate the risk of late notifications occurring;
- (c) As set out in paragraphs 54 to 70 above, Meta has previously either failed to seek consent for a key staff change, or only informed the CMA of changes to key staff (or provided complete information of the planned changes) a matter of days before the employee was due to depart the company (and the changes would come into effect).
- (d) In the CMA's view, the deficiencies in Meta's compliance processes mitigated the effectiveness of its ability to monitor planned and anticipated key staff changes. These deficiencies ultimately led to the Key Staff Departure Breaches.

- 201. On that basis, the CMA has decided to impose a single penalty in relation to the Key Staff Departure Breaches, to better capture the seriousness of Meta's defective approach to compliance with the IEO, and to set a penalty at a level that is appropriate and proportionate in view of all the circumstances of the case.
- 202. As further discussed below and in line with the Penalties Guidance, the CMA's assessment of the nature and gravity of Meta's failure to comply with the IEO takes account of the extent to which Meta complied with the IEO. Within that context, the robustness of Meta's compliance processes (in

addition to the nature and gravity of the individual breaches) is an important consideration for a penalty in relation to the Key Staff Departure Breaches that is appropriate and proportionate in view of their nature and gravity.

203. Meta submitted that the penalty proposed by the CMA in the Provisional Penalty Decision exceeded the penalties imposed in previous cases (excluding the October Penalty Decision) and is 10 times higher than the penalty imposed on Meta for the previous key staff related breach.¹³² The CMA notes that the revised penalty that it has decided to impose is now three times higher than the penalty imposed on Meta for the previous key staff related breach (ie Breach 3 of the October Penalty Decision).
204. The CMA considers that it is necessary to be cautious when drawing comparisons with previous decisions. The CMA's previous decisions do not create binding precedents analogous to case law. Each case turns heavily on its own facts, which the CMA must assess in each case by applying the published policy and exercising its judgement in relation to the facts of the particular case.
205. The CMA no longer considers the Key Staff Departure Breaches to reflect a disregard by Meta (and its staff) for the requirements of the IEO of a similar nature as the one identified in the context of the October Penalty Decision. However, it considers that there are other circumstances specific to the Key Staff Departure Breaches which need to be taken into account in determining a penalty that is appropriate and proportionate to the breach so as to achieve the objectives of the penalty, including incentivising compliance with interim measures and deterring future failures to comply. In particular, it has taken account of the fact that
- (a) The Key Staff Departure Breaches reflect Meta's failure to implement a sufficiently robust mechanism to ensure compliance with the IEO, and specifically timely reporting of planned changes to key staff for the reasons set out in paragraphs 114 to 125 above.
 - (b) These breaches took place after the granting of the Carve-Out Derogation, when there was no room for any level of doubt that Ms [A], Mr [B], and Mr [C] were 'key staff' for the purposes of the IEO (see paragraphs 129 to 131 above).
 - (c) As set out in paragraphs 54 to 70 above, it is not the first time that Meta has failed to seek consent for a key staff change, and the CMA has previously warned Meta to give advance notice of any urgent actions

¹³² Provisional Penalty Decision Response, paragraph 1.24.

which require a derogation such as planned key staff changes. Despite this, three consecutive instances where Meta's compliance team seemed unaware of the departure of three key staff members occurred.

206. For these reasons, taken in the round, the CMA continues to consider the Key Staff Departure Breach to be of somewhat more serious and flagrant nature relative to the key staff breach identified in the October Penalty Decision.
207. Therefore, in view of the specific circumstances of the Key Staff Departure Breaches (including the aggravating and mitigating factors discussed below), the CMA considers that the penalty imposed in this decision is broadly consistent with the amount imposed in previous penalty decisions, including in relation to Breach 3 of the October Penalty Decision. This is consistent with the Penalties Guidance, which makes it clear that the CMA will assess all the relevant circumstances of the case in the round in order to determine a penalty that is reasonable, appropriate and thus proportionate in the circumstances.¹³³
208. In addition to the above considerations, the CMA has also considered whether the other factors listed in the Penalties Guidance supported a higher or lower penalty.

Aggravating factors

209. The CMA is of the view that the following factors listed in paragraph 4.11 of the Penalties Guidance support, on balance, the imposition of a higher penalty:
- *The nature and gravity of the failure, including: whether it was intentional or negligent, there was any attempt to conceal the failure, and the extent to which Meta complied with other aspects of the investigatory and interim measures requirements*
210. As set out above, the CMA finds that each of the Key Staff Departure Breaches was particularly flagrant, and that Meta must have either been aware (or could not have been unaware), or ought to have known, that its conduct in failing to report resignations of key staff in time would constitute a failure to comply with the IEO.

¹³³ Penalties Guidance, paragraph 4.11. See by analogy *Ecolab Inc v Competition and Markets Authority* [2020] CAT 12, paragraph 93.

211. The CMA's view on the seriousness of these breaches is set out above at paragraphs 191 to 194.
212. The CMA also considers that the penalty for the Key Staff Departure Breaches should reflect the specific circumstances of these breaches, as well as the specific additional concerns identified at paragraphs 189 to 194 above:
- (a) The Key Staff Departure Breaches occurred even though the scope of the IEO was clear and all three key staff members who resigned were unambiguously key staff for the purposes of the IEO as they had been included by Meta to a narrow list of key staff;
 - (b) Prior to the Key Staff Departure Breaches, Meta was aware that it was required to seek consent from the CMA where key staff changes arise due to staff resignations.¹³⁴ Meta had also been previously warned to give advance notice of any urgent actions which require a derogation such as planned key staff changes.¹³⁵ Furthermore, Meta was aware from the CMA's letter dated 2 July 2021 that the CMA considered a failure to notify the CMA of a change to key staff may constitute a breach of the IEO. And yet despite these clear indications from the CMA, in three consecutive instances Meta failed to report and seek consent for, or inform the CMA of, key staff changes before they were implemented (although the CMA notes that Meta did not seek to conceal the failures to comply (see further below at paragraph 217)); and
 - (c) The CMA's view is that the compliance processes put in place by Meta were insufficiently robust to capture planned or anticipated key staff changes, and/or the compliance processes were not scrupulously complied with by Meta's employees (noting that Meta did not implement the Monitoring Trustee's recommendations to strengthen these controls until after the departures of the three key staff members were reported to the CMA).
213. In view of the above considerations, taken in the round, the CMA finds that the nature and gravity of Meta's failure to comply supports the imposition of a higher penalty.

¹³⁴ See paragraphs 54 to 70 above.

¹³⁵ Set out in paragraph 66 above.

- *Whether Meta has ever failed to comply with an Investigatory Requirement¹³⁶, interim measures, or CMA decision*

214. The CMA considers the Key Staff Departure Breaches reflect Meta's failure to implement a sufficiently robust mechanism to ensure compliance with the IEO and this factor has been taken into account in assessing the nature and gravity of the Key Staff Departure Breaches (see paragraphs 210 to 213 above).

- *Any prejudice which failure to comply might cause to the CMA's ability to take remedial action if deemed necessary*

215. For the reasons set out in paragraphs 169 and 195 to 196, the CMA has found that Meta's conduct risked prejudicing the reference or impeding action justified by the CMA's decisions on the reference.

Mitigating factors

216. The CMA is of the view that the following factors listed in paragraph 4.11 of the Penalties Guidance support the imposition of a lower penalty:

- *Cessation of the failure after Meta became aware of the contravention or failure*

217. Meta's compliance team appears to have notified the CMA of Ms [A]'s and Messrs [B] and [C]'s departures once made aware of these developments by the relevant HR individual or departing employee.

- *Steps in mitigation to comply after becoming aware of the failure*

218. Meta informed the CMA that its compliance team sent a reminder email on 22 September 2021 to individuals in HR of their obligations under the IEO. The email reminded HR staff that staff changes include '*departures, promotions, changes of position (whether by applying to an internal role, or change of title in current role), and reorgs that change reporting lines to a new manager*' and that Meta's compliance team needs to know of such changes before they happen. Meta also noted that it held bilateral discussions with the HRBP

¹³⁶ This refers to requirements under the EA02: notices requiring the attendance of witnesses, production of documents or supply of estimates, forecasts, returns or other information in Phase 1 and Phase 2 mergers and markets investigations

responsible for the delayed notification of Messrs [B]'s and [C]'s departures.¹³⁷

219. The CMA notes that Meta has agreed to update the language of its compliance control in response to a suggestion by the Monitoring Trustee.

220. However, the CMA has not been taken into account as a mitigating factor as Meta's view is that this would not have avoided the Key Staff Departure Breaches identified in this decision.¹³⁸

- *Whether Meta derived any advantage from its failure to comply with the Investigatory Requirements or interim measures*

221. The CMA has not identified any material benefit derived by Meta from the Key Staff Departure Breaches.

- *Other mitigating factors*

222. In the Provisional Penalty Decision Response, Meta submitted that the CMA has failed to have regard to other mitigating factors. The CMA has considered Meta's submissions when deciding on the appropriate level of the penalty. However, for the reasons explained below, the CMA considers these factors to be of limited weight in the circumstances. Meta's submissions, and the CMA's assessment, are set out below.

(a) Meta submitted that it treats compliance with the IEO with the '*utmost seriousness*' and that it has expended significant time, effort and resources in creating a comprehensive compliance regime which meets and exceeds the measures proposed by the CMA in the revised draft Interim Measures Guidance. According to Meta, the extensive nature of its compliance controls to ensure key staff changes were brought to the prompt attention of the CMA is consistent with the '*seriousness with which Meta takes its obligations under the IEO*'.¹³⁹ The CMA does not however agree with this submission for the reasons set out at paragraphs 115 to 117 above.

(b) Meta submitted that none of the Key Staff Departure Breaches occurred because of insufficient financial incentives being offered to retain the relevant individuals, and it would be disproportionate and unreasonable to impose a significant fine where Meta took all necessary action to

¹³⁷ Facebook's response to the section 109 notice of 13 October 2021 dated 25 October 2021, paragraphs 5.1 to 5.3.

¹³⁸ Preliminary Letter Response, page 4.

¹³⁹ Provisional Penalty Decision Response, paragraph 1.33(a).

sufficiently incentivise the key staff members to stay.¹⁴⁰ For the reasons set out in paragraph 165 above, the CMA does not consider this to be a mitigating factor. While the CMA recognises that Meta cannot prevent otherwise well-incentivised key staff to remain, Meta can and must inform the CMA when key staff have resigned before they depart the business and seek derogations in relation to the changes made to key staff as a result.

- (c) Meta submitted that it has cooperated with the Monitoring Trustee in accepting its recommendations in relation to key staff-related compliance controls.¹⁴¹ As set out in paragraph 220 above, the CMA has not taken this into account because of Meta's assertion that such changes would not have avoided the Key Staff Departure Breaches identified in this decision. However, the CMA has taken into account steps taken by Meta to avoid these breaches from occurring in the future.
- (d) Meta submitted that it has '*at all times complied with the primary obligations of the IEO*' to ensure Giphy's independent operation and to preserve its GIF-related Activities.¹⁴² The CMA does not consider this to be a mitigating factor. Complying with the terms of an IEO simply reflects the legal obligation that Meta is under and does not mitigate in any way its responsibility for failing to comply with the IEO.

Other factors

223. The CMA has considered the following factors listed in paragraph 4.11 of the Penalties Guidance but does not consider that these materially affect the determination of the appropriate level of the penalty:

- *Scale of any adverse effects on the Merger process (including costs to the case)*

224. Meta's repeated failures to comply with the IEO have required investigation by the CMA, diverting resources from other matters of public interest, including the substantive assessment of the Merger, at a cost to the public purse. However, the CMA considers this factor to be of limited weight in the circumstances, as Meta's compliance team brought the key staff departures to the CMA's attention.

¹⁴⁰ Provisional Penalty Decision Response, paragraph 1.33(b).

¹⁴¹ Provisional Penalty Decision Response, paragraph 1.33(c).

¹⁴² Provisional Penalty Decision Response, paragraph 1.33(d).

- *The reasons given by Meta for the failure to comply with the Investigatory Requirements or interim measures*

225. The CMA has considered Meta's representations in Sections C and D above, and for the reasons set out in those sections we do not agree with the reasons given by Meta for the failure to comply.

- *Whether the involvement of senior management or officers contributed to any failure*

226. The CMA notes that the Key Staff Departure Breaches were the results of failures by HR staff, the departing employees, and the relevant line managers (ie not senior management or officers) to communicate with Meta's compliance team, and that the latter reported the three key staff member departures once made aware of these. However, the CMA also notes that it is the responsibility of the Chief Compliance Officer, a member of the senior management team (see paragraph 221 of the October Penalty Decision) to ensure that Meta is complying with the IEO, that the appropriate mechanisms and compliance processes are in place to monitor IEO compliance, and that Meta's employees comply with such mechanisms and compliance processes. As set out in paragraphs 114 to 128 above, the CMA is of the view that Meta's compliance processes had deficiencies which ultimately led to the Key Staff Departure Breaches.

The size of, and administrative and financial resources available to Meta

227. The CMA has also had regard to the size and financial resources available to Meta.¹⁴³ This is because the CMA must ensure that administrative penalties achieve the deterrence required at a level which is fair, reasonable and proportionate in view of the circumstances of the case, including the size and financial resources available to parties. As set out in paragraph 4.11 of the Penalties Guidance, the CMA is likely to set higher penalties where it is necessary to do so having regard to the parties' size and financial position.

228. In determining the appropriate level of penalty, the CMA has therefore considered the last fully audited financial statement for Meta for the year preceding the imposition of the IEO,¹⁴⁴ ie the financial year ended 31 December 2019. This statement shows that Meta is one of the largest (by market capitalisation and turnover) and most profitable undertakings in the world. Its turnover was USD\$70,697 million (£55,405.23 million), its operating

¹⁴³ Penalties Guidance, paragraph 4.11.

¹⁴⁴ Enterprise Act 2002 (Mergers) (Interim Measures: Financial Penalties) (Determination of Control and Turnover) Order 2014, Article 3.

profit was USD \$24,812 million (£19,445.16 million), its profit after tax was USD \$18,485 million (£14,486.69 million, i.e. a profit margin of nearly 25%), and its net assets were USD \$101,054 million (£79,196.02 million).¹⁴⁵

229. The above information indicates that Meta had sufficient financial resources available to it to ensure compliance with the IEO and to engage with the CMA's process.

Assessment of Meta's further submissions on the CMA's approach to determining the appropriate amount of the penalties

230. In its submissions, Meta stated that
- (a) the CMA has failed to meet its obligations under section 94B(2) of the EA02 which requires that the CMA must set out '*...the considerations relevant to the determination of the amount [i.e., how to quantify] of any penalty imposed under section 94A*', and contrasted the Penalties Guidance with the approach set out in the CMA guidance for calculating fines for breaches of competition law under the Competition Act 1998 (ie CMA73).¹⁴⁶ On that basis, Meta submitted that its rights of defence are prejudiced as it has not been afforded the opportunity to comment on how the fine was calculated;¹⁴⁷ and
 - (b) the CMA failed to set out how it quantified the amount of the penalty in the Provisional Penalty Decision.¹⁴⁸
231. In line with the process outlined in section 94B of the EA02, the Penalties Guidance has been adopted by the CMA following open consultation and subsequent approval by the Secretary of State. A presumption of regularity applies to the Penalties Guidance, that is the presumption that a public law decision is presumed to be valid unless and until quashed as being unlawful.¹⁴⁹ Contrary to CMA73, the approach provided for by the Penalties Guidance is that the CMA must consider all the relevant circumstances in the round in order to determine a penalty that is reasonable, appropriate and thus proportionate in the circumstances (see paragraph 4.11 of the Penalties Guidance). This is the approach that has been followed by the CMA in this case (and in previous cases): the reasons for its provisional penalty, which

¹⁴⁵ Meta paid USD \$315 million in cash, with an additional USD [X] being provided to certain Giphy personnel in the form of Restricted Stock Units [X] paragraph 2.8 of the Final Merger Notice submitted on 26 January 2021).

¹⁴⁶ Provisional Penalty Decision Response, paragraph 1.27.

¹⁴⁷ Provisional Penalty Decision Response, paragraph 1.29.

¹⁴⁸ Provisional Penalty Decision Response, paragraph 1.7.

¹⁴⁹ See *DHL International (UK) Limited v Ofcom* [2016] EWHC 938 (Admin), paragraph 108, and case law cited therein.

are in line with the Penalties Guidance, were set out in the Provisional Penalty Decision and Meta has had an opportunity to comment.

Conclusion on the imposition of a penalty

232. As set out in the Penalties Guidelines, the CMA must determine a penalty that is appropriate, taking into account all the relevant circumstances of the case to achieve the policy objectives set out in the Penalties Guidance, and in particular the need to deter Meta and other companies from contravening interim measures in the future, and to ensure that they scrupulously comply with interim measures imposed by the CMA (see paragraphs 181 to 185 above).
233. For the purposes of identifying the appropriate level of the penalty, the CMA considered the relevant factors and circumstances of this case set out in this decision in the round, and in particular, the following important factors:
- (a) the serious and particularly flagrant nature of these repeated failures to comply with the IEO, for the reasons set out at paragraphs 189 to 194 above. In particular, Meta was under a clear and unambiguous obligation to seek consent prior to changes to key staff such as Ms [A] and Messrs [B] and [C] and to actively inform the CMA of the details of staff who leave Meta. Meta was previously warned to inform the CMA of planned changes and received recommendations from the Monitoring Trustee to amend its compliance controls to avoid late notifications of key staff changes from arising;
 - (b) the fact that these breaches taken in the round reflect Meta's failure to implement sufficiently robust mechanisms to ensure compliance with the IEO, and specifically timely reporting of planned changes to key staff. The CMA is therefore of the view that the penalty should reflect this circumstance, so that the penalty in this decision is appropriate and proportionate to achieve its objectives;
 - (c) Meta's defective approach to compliance undermined the CMA's ability to exercise its monitoring functions under the IEO. This is particularly concerning given Meta's repeated assertions that unqualified compliance with the IEO would not be possible due to its wide scope unless and until a derogation – including a complete list of key staff – was granted to the IEO. Now, after the granting of the Carve-Out Derogation, including a list of a very limited number of individuals identified by name as key staff, there were still repeated failures by Meta to report departures of key staff

to the CMA in a timely manner and seek consent for the key staff changes resulting from the departures;

- (d) Meta's reporting of the three departures of key staff once its compliance team became aware of these, and steps taken in mitigation; and
- (e) Meta's size and financial position.

234. In view of the above, the CMA has decided that the imposition of a penalty of £1.5 million is sufficient and proportionate to achieve its objectives:

- (a) the penalty is substantially below the statutory maximum of 5% of Meta's global turnover; and
- (b) in view of Meta's significant financial resources, the penalty is not anomalous, nor would affect Meta materially or disproportionately.

F. Next steps

235. Meta has the following rights in relation to the final penalty which the CMA has imposed:

- (a) Meta is required to pay the penalty in a single payment, by cheque or bank transfer to an account specified to Meta by the CMA, by close of banking business on the date which is 28 days from the date of service of this notice on Meta.
- (b) Meta may pay the penalty or different portions of it earlier than the date by which it is required to be paid.
- (c) Pursuant to section 112(3) of the EA02, Meta has the right to apply to the CMA within 14 days of the date on which this notice is served on them for the CMA to specify different dates by which the penalty or different portions of it are to be paid.
- (d) Pursuant to section 114 of the EA02, Meta has the right to apply to the Tribunal against any decision the CMA reaches in response to an application under section 112(3) of the EA02, within the period of 28 days starting with the day on which Meta is notified of the CMA's decision.
- (e) Pursuant to section 114 of the EA02, Meta has the right to apply to the Tribunal within the period of 28 days starting with the day on which this notice is served on Meta in relation to:
 - i. the imposition or nature of the penalty;

- ii. the amount of the penalty; or
 - iii. the date by which the penalty is required to be paid or (as the case may be) the different dates by which portions of the penalty are required to be paid.
- (f) If Meta applies to the CMA pursuant to section 112(3) of the EA02 for the CMA to specify a different date by which the penalty is to be paid, then the period of 28 days referred to in relation to (e)(iii) above shall start with the day on which they are notified of the CMA's decision on the section 112(3) application.
- (g) Where a penalty, or any portion of such penalty, has not been paid by the date on which it is required to be paid and there is no pending appeal under section 114 of the EA02, the CMA may recover any of the penalty and any interest which has not been paid; in England and Wales such penalty and interest may be recovered as a civil debt due to the CMA.¹⁵⁰

[Signature]

Joel Bamford
Senior Director, Mergers
Competition and Markets Authority
4 February 2022

Appendices:

1. Previous key staff resignations
2. Bundle of non-public documents relied on in evidence

¹⁵⁰ Section 115 of the EA02. Section 113 of the EA02 covers (among other matters) the interest payable if the whole or any portion of a penalty is not paid by the date by which it is required to be paid.