**9 August 2022**

**GIPHY's Submission to the CMA on Remittal**

## 1 Introduction

1.1 On 18 July 2022, the Remittal Group adopted the CMA's phase 2 final report as the provisional findings for the remitted case (the "**Remittal Provisional Findings**"). The Remittal Provisional Findings make available previously redacted evidence (the "**Withheld Evidence**"), which confirms that there is no case for ordering an unwinding of the acquisition by Meta Platforms, Inc. ("**Meta**") of GIPHY, Inc. ("**GIPHY**", together with Meta the "**Parties**") (the "**Transaction**").

1.2 Taking into account the Withheld Evidence and market developments since the Transaction, GIPHY strongly disagrees that the Transaction will lead to a substantial lessening of competition ("**SLC**") in the UK. However, even if the CMA were to find an SLC, GIPHY notes that a full divestiture remedy comes with considerable risks.

1.3 Remedies identified by the CMA must be effective in addressing the SLC and any resulting adverse effects. When assessing the effectiveness of a divestment remedy, the CMA must have regard to:[1]

(a) Composition risks relating to the scope and composition of the divestiture package;

(b) Purchaser risks relating to the identification of a suitable purchaser; and

(c) Asset risks relating to the competitive capability of the divestiture package deteriorating before completion.

1.4 As explained below, the proposed divestiture carries high purchaser and asset risks which would need to be carefully managed in consultation with GIPHY.

## 2 CMA's Proposed Divestment Remedy

***Purchaser Risk***

2.1 There is a high risk that the only purchasers interested in acquiring the GIPHY business (if any) will be weak or inappropriate.[2] Given the market developments since the Final Report (as described below), GIPHY is now [✂] less attractive than it was two years ago – [✂] – and consequently GIPHY predicts less interest today from suitable purchasers than there was at the time of the Transaction.

*There is a lack of suitable interested purchasers*

2.2 As GIPHY has previously submitted[3], the universe of potentially interested purchasers is limited, [✂]. The Withheld Evidence confirms this:

(a) At the time of the Transaction a large group of companies were approached by JPMorgan.[4] None of [✂] expressed any interest in acquiring GIPHY. Each of Adobe,

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1 CMA Merger Remedies Guidance, para. 5.3.

2 As explained in the CMA Merger Remedies Guidance, a disposal to a "*weak or otherwise inappropriate purchaser*" would limit the effectiveness of a divestiture remedy, para. 5.3(b).

3 *See* e.g. GIPHY's response to the Remedies Working Paper dated 22 October 2021, paras. 3.13-3.17.

4 Remittal Provisional Findings, fn. 729.

Amazon, Apple, Bytedance, Kauishou, Snap and Twitter indicated their willingness to discuss the opportunity but none of these discussions proceeded beyond initial contacts. The CMA has not identified a single other third party who was not given the opportunity to acquire GIPHY and who may have been interested in doing so. Instead, the CMA relies on a negative inference to show that there may have been interest in Giphy: "*We also note that in conjunction with the pause in efforts to market GIPHY as a result of the 'no-shop' provision in the term sheet with Facebook, we found no documentation that showed that* [✂]."[5]

(b) The Withheld Evidence shows that a number of companies which may, at first blush, potentially have been viewed as a fit with GIPHY, have confirmed to the CMA that they are very unlikely to be interested, each citing different reasons as to why GIPHY remains unattractive:

- [✂].[6]
- Playtika stated that any interest it might have in acquiring GIPHY would depend first and foremost on a *"stable, if not growing, audience size and user engagement."*[7] [✂].
- [✂] stated that if GIPHY came on the market today, "*it would not see huge value in presenting a full acquisition to the acquisitions team*" largely due to [✂], an issue that likely had not changed since [✂]. [✂] also stated that it was unsure whether it would be interested in the monetisation product of GIPHY.[8]

2.3 As explained above, the Withheld Evidence shows that [✂]. This lack of interest was not, contrary to the CMA's theory, due to the 'no-shop provision' applied by Meta. The Withheld Evidence also shows that, as confirmed by a number of companies during the course of the CMA's investigation, there remains a lack of interest today.

*Market developments*

2.4 Market developments since the Final Report have meant that GIPHY is an [✂] less attractive investment opportunity than it was two years ago. [✂].

2.5 As confirmed in the Remittal Provisional Findings[9], GIPHY's monetisation business has not been operating for the last two years, and GIPHY has not generated any revenues or benefitted from Meta's wider organisation to develop new products. This contrasts with the support received by two of GIPHY's significant competitors, Tenor and Gfycat, both of which have been acquired by well-resourced platforms (Google and Snap, respectively).

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5 Remittal Provisional Findings, para. 11.176.

6 Remittal Provisional Findings, para. 11.156.

7 Remittal Provisional Findings, para. 11.157.

8 Remittal Provisional Findings, para. 11.156.

9 Remittal Provisional Findings, para. 11.21: "*[….] GIPHY is in a significantly weaker position than it was pre-Merger. GIPHY's revenue-generating activities were terminated as a result of the Merger, almost all of its employees were transferred to Facebook employment contracts (which included significant long-term incentive payments), and the cash on its balance sheet was returned to shareholders*."

2.6 Even if a purchaser were to be interested in investing in efforts to generate revenues through paid alignments today, [✂].[10] [✂].[11] [✂].

2.7 Moreover, investor interest will be dampened further by wider market developments including: (i) the lack of any positive news regarding any efforts on the part of either [✂]; (ii) [✂]; and (iii) the current economic climate which would be a key factor in any decision taken by investors today. This is even more critical given that GIPHY has no proven revenue stream (of any significance) and the purchaser would need to commit to enter a new market in the UK, which would be a highly risky venture.

2.8 Neither [✂]. In fact, the Withheld Evidence submitted by [✂] shows that [✂]. In addition, [✂].[12]

2.9 Further, there are indications of an overall decline in GIF use. GIPHY does not believe that this decline is attributable to the Transaction (with the possible exception of some drop off in Kika media loads[13]), but rather is due to a general waning of user and content partner interest in GIFs:

(a) Marketplace commentary and user sentiment towards GIFs on social media shows that they have fallen out of fashion as a content form, with younger users in particular describing GIFs as “for boomers” and “cringe”.[14]

(b) Content creators are also finding less value in GIFs, with GIPHY experiencing a [✂]% drop in total GIF uploads between October 2020 and May 2022. GIPHY also experienced a [✂]% drop in the number of accounts created by content partners between October 2022 and May 2022, and a [✂]% drop in content partner uploads between March 2021 and May 2022.

2.10 Lastly, the unstable economic climate both globally and in the UK will dampen investor appetite [✂]. Moreover, particularly in this current climate, investors are unlikely to commit to new market entry in the UK with an unproven paid alignment model. The CMA's requirement for the purchasers' business plans to give consideration “*to routes for entry to the UK in the near future*" will only add to the list of factors weighing against investment.[15]

*Weak or inappropriate purchaser*

2.11 GIPHY believes that the pool of suitable companies that might express an interest in purchasing GIPHY will be limited, and [✂] smaller now than at the time of the Transaction or the date of the Final Report.

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10 Remittal Provisional Findings, paras. 5.60-5.61: [✂].

11 As Meta’s internal documents show, Meta had previously indicated to GIPHY that it was not interested in Paid Alignments as a partnership opportunity with GIPHY (or any other independent third party). *See* further, the Parties’ Response to the Provisional Findings, para. 6.21.

12 Remittal Provisional Findings, para. 9.101.

13 GIPHY is aware that Kika removed some API enhancements post-Transaction.

14 *See* e.g. Vice, GIFs Are For Boomers Now, Sorry, Slate, Every Generation Has Its Cringe, and numerous examples on Twitter (including https://twitter.com/danrobinson/status/1542572835612160001; https://twitter.com/ExtraNoodlesCo/status/1423356546335997955; https://twitter.com/almostcmb/status/1547680951819329537).

15 Remittal Provisional Findings, para. 11.167.

2.12 Given that there would be very few (if any) candidates which might proceed to M&A negotiations with Meta, it will be imperative that the CMA considers the suitability of the proposed potential purchaser very carefully to ensure that the purchaser will have the funds, market knowledge and management structure to enable GIPHY to start to rebuild and compete vigorously in the future with Google/Tenor and Snap/Gfycat, including by innovating outside of any monetisation efforts.[16]

2.13 As Giphy has previously submitted, delivering GIFs at scale to the entire internet requires somebody with industry knowledge and experience managing a group of young tech engineers, product managers and staff.[17] Financial buyers (such as private equity companies), for example, would not have the requisite expertise, and would not be able to incentivise GIPHY's staff to stay with the business as they would have an unattractive company profile, staff profile and business model (see further below).[18] In order to compete effectively with Google/Tenor and Snap/Gfycat, it is also important for GIPHY to innovate outside of any monetisation efforts. However, a financial buyer will be focused on revenue-generation and less likely to invest in improving GIPHY's core service – the supply of GIFs to API partners. In fact, there is a high risk that a financial buyer will seek to cut costs in a variety of ways that negatively impact GIPHY's core value and ability to compete, including even ceasing to supply content altogether to some third parties. This is supported by the Withheld Evidence – as Betaworks explains, although private equity could be considered, realistically this would be a "*poor fit*".[19] The buyer's reputation is also important. Some companies (e.g. [✂][20]) are notorious for acquiring companies and then dismissing the majority of their employees. A divestiture to such a purchaser would almost certainly result in the loss of key employees, and would not address the competition concerns raised by the CMA.

2.14 As a feature provider with no meaningful revenue-generating business, GIPHY is best-suited, and most likely to be attractive, to a vertically integrated purchaser with its own user base through which it can monetise GIFs. If the purchaser is not suitable, the GIPHY brand will suffer, GIPHY will not be able to retain staff, and GIPHY will lose its competitive capability very quickly. GIPHY therefore urges the CMA to give careful thought to the track-record, deal rationale and business plans of any potential purchaser to ensure that the GIPHY business would be able to survive and grow in such an environment.[21] Given the high purchaser risk, it is essential that GIPHY is closely involved in the selection process (as explained further below).

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16 In accordance with the CMA Merger Remedies Guidance, the CMA must "*assess whether the purchaser will compete vigorously in the future on the basis of what it has acquired to address the SLC or the adverse effect resulting from it. The CMA will consider carefully the evidential basis on which the merger parties (and the proposed purchaser) assert that the proposed purchaser will have an incentive to compete going forward*", para. 5.26.

17 *See* e.g. GIPHY's response to the Remedies Working Paper dated 22 October 2021, para. 3.16.

18 *See* e.g. GIPHY's response to the Remedies Working Paper dated 22 October 2021, para. 3.5.

19 Remittal Provisional Findings, para. 11.154.

20 [✂].

21 In accordance with the CMA Merger Remedies Guidance, "*The CMA will wish to satisfy itself that the purchaser has an appropriate business plan and objectives for competing in the relevant market(s), and that the purchaser has the incentive and intention to maintain and operate the relevant business as part of a viable and active business*", para. 5.21(d).

***Asset Risk***

2.15 The identity of the potential purchaser will also have a significant effect on the value of the GIPHY business, which could deteriorate through departures of key staff and/or damage to the GIPHY brand prior to completion.[22]

2.16 GIPHY staff have institutional knowledge and credibility that is irreplaceable. It is unlikely that staff could be incentivised to transfer from Meta contracts to GIPHY contracts, as proposed by the CMA, until they know at least: (i) the identity of the purchaser; (ii) the purchaser's vision and business plan for GIPHY; and, at least in relation to key staff, (iii) the purchaser's proposals in relation to long-term compensation. [✂].

2.17 GIPHY's brand is also essential to its ability to retain key content and API partners, and would be undermined if the purchaser has, for example, the wrong company profile (e.g. it is a financial buyer that is not perceived to be innovative or "cool"), the wrong staff profile (e.g. it fails to retain talent), or the wrong business model (e.g. it pushes ahead with GIF monetisation at the expense of user experience – for example, it would be particularly damaging for GIPHY's brand if the purchaser were to pursue an invasive ads model). In such circumstances, in addition to turning off users, Giphy risks losing its content and API partners – who are often highly brand conscious – to competing GIF providers such as Tenor and/or Gfycat.

2.18 The risks surrounding the identity of potential purchasers therefore results in a significant asset risk. As the CMA acknowledges, GIPHY's staff, IP and other assets, are essential to its viability after a divestiture.[23] It is therefore vital that the CMA scrutinises purchaser plans for staff retention and rules out any potential purchasers that cannot offer sufficient incentives for staff to remain with GIPHY post-divestment. The CMA should also assess whether the potential purchaser would likely be attractive to content partners and avoid damaging the GIPHY brand. Given the risks, it is essential that GIPHY is consulted and closely involved in the purchaser selection process, as well as the design of staff incentives packages. Having continued to operate independently since the Transaction, GIPHY is best placed to comment on the roles, compensation (including long-term packages) and other incentives for staff that are necessary to enable GIPHY to remain viable and compete successfully under new ownership.

## 3 Alternative Remedy Package

3.1 GIPHY remains of the view that a package of behavioural remedies would be an effective, practicable and proportionate alternative to divestiture.[24] As explained in the Parties' Initial Submission on Remittal, Meta proposed a package of such remedies during the CMA's initial phase 2 investigation (which GIPHY supported[25]), and on 2 February 2022 the AFCA cleared the Transaction subject to substantially similar remedies (the "**Alternative Remedy Package**").

3.2 The Alternative Remedy Package is also appropriate in light of the market developments described above and revealed in the Withheld Evidence. Any SLC in the UK market caused by the Transaction would have been fleeting in light of Snap's intentions for and progress with developing Gfycat. As explained further in the Parties' Initial Submission on Remittal, Snap's

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22 CMA Merger Remedies Guidance, para. 5.3.

23 Remittal Provisional Findings, para. 11.44 and 11.73.

24 In accordance with the CMA Merger Remedies Guidance, the CMA must "*seek to select the least costly remedy, or package of remedies, of those remedy options that it considers will be effective*" and "*ensure that no remedy is disproportionate in relation to the SLC and its adverse effects*", para. 3.6.

25 GIPHY's response to the Remedies Working Paper dated 22 October 2021, para. 6.

acquisition is evidence of vibrant, ecosystem-level competition, and the Alternative Remedy Package would be a highly effective way of eliminating any SLC for the time-limited duration of that SLC.