

## Remittal Initial Submission

1. On 30 November 2021, the Competition and Markets Authority (the “CMA”) published its Phase 2 Final Report (the “**Final Report**”) into the acquisition by Meta Platforms, Inc. (previously known as Facebook, Inc) (“**Meta**”) of GIPHY, Inc. (“**GIPHY**”, together with Meta the “**Parties**”) (the “**Transaction**”). However, on 15 July 2022, the Competition Appeal Tribunal (the “**CAT**”) quashed the Final Report – in light of serious procedural failings – and remitted the case to the CMA for reconsideration. The same group of panel members responsible for the Final Report was appointed to conduct the investigation on remittal (the “**Remittal Group**”). This submission provides the Parties’ initial observations on the conduct of this reinvestigation and the information before the Remittal Group.
2. The Remittal Group “*intends to focus the scope of the remittal inquiry on addressing the specific failure identified by the Tribunal, viz. disclosing to Meta and GIPHY, and therefore enabling them to make representations on, the previously redacted material from the provisional findings and Phase 2 Final Report*”.<sup>1</sup> The Remittal Group adopted the CMA’s Final Report as the provisional findings for the remitted case (the “**Remittal Provisional Findings**”) disclosing a fully unredacted version to the Parties’ advisors within a confidentiality ring. (References to the “Final Report” in this submission should therefore be understood as also referring to the “Remittal Provisional Findings”.)
3. The Remittal provides an opportunity to correct the misapprehensions and shortcomings in the Final Report (and therefore the Remittal Provisional Findings). The previously redacted evidence which has now been disclosed as part of the unredacted Final Report (the “**Withheld Evidence**”) confirms that there was no case for prohibition at the time of the Final Report; market developments since the Final Report have further strengthened this view. In summary:
  - a. First, in the Withheld Evidence, Snap confirmed [REDACTED].<sup>2</sup> Snap’s plan reflected its belief that [REDACTED].<sup>3</sup> In the eight months since the Final Report, Snap has begun executing on this plan and Gfycat’s content is now used within Snap’s services. Neither the Final Report’s horizontal theory, nor its vertical theory, can be sustained in light of these developments.
  - b. Second, the Withheld Evidence shows that Google, which the CMA has described as one of the “*largest [digital advertising] platforms by far*”,<sup>4</sup> perceived so little value in GIF-based advertising that [REDACTED].
  - c. Third, while GIF-based advertising has proven unsuccessful, using the CMA’s market definitions, competition in digital advertising (and display advertising therein) has intensified.<sup>5</sup> The developments confirm that GIPHY was not a material competitive constraint – whether static, potential, or dynamic – on Meta’s advertising business in the UK (or further afield).

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<sup>1</sup> Consultation Letter, 18 July 2022, paragraph 6.

<sup>2</sup> Remittal Provisional Findings, 5.60 and 9.78.

<sup>3</sup> Remittal Provisional Findings, 5.60.

<sup>4</sup> Online Platforms and Digital Advertising Report, July 2020, p.5 (the “**Digital Market Study**”)

<sup>5</sup> For ease of reference, the Parties have referred to the CMA’s terms on market definition without adopting them or accepting those as proper definitions of relevant markets.

4. The Remittal Group now has an opportunity to reassess the Transaction’s competitive effects with the benefit of this additional evidence. The evidence will show that – consistent with Meta’s prior submissions and the undisclosed material unlawfully withheld from it – the Transaction has not led, and could not realistically lead, to a substantial lessening of competition (“SLC”) in any UK market. The remainder of the submission considers the additional evidence further with respect to the horizontal and vertical theories of harm.

### The Horizontal Theory of Harm

5. The Final Report found that the Merger would lead to an SLC “*in the supply of display advertising*”<sup>6</sup> in the UK, by virtue of a loss of dynamic competition. The CAT articulated a framework for the CMA when evaluating such theories of harm:
- a. First, an analysis of the state of static competition in the relevant market segment(s) (here, digital advertising and display advertising in particular), which the CAT considered should inform any evaluation of dynamic competition in the same segment(s).<sup>7</sup>
  - b. Second, an estimation of the likely future state of the merging parties absent the Transaction. The CAT considered that “*it makes sense... to consider those trends that can more reliably be determined (potential competition) before moving on to that which is likely to be more speculative (dynamic competition)*”.<sup>8</sup>
  - c. Third, an assessment of the timeframe within which any dynamic competition between the merging parties might manifest. The CAT added in this regard that a dynamic competition theory of harm could not be sustained if “*such impairment to dynamic competition [...] is not thought to manifest itself within five years at the outside*”.<sup>9</sup>
  - d. Fourth, an assessment of the market position of the merging parties in light of the above factors, and of the competitive dynamic between them.
  - e. Fifth, an evaluation of whether the dynamic competition will in fact manifest or if the purportedly competing business is a “*dud*”, taking into account: (i) the motives and thinking of the merging firms, (ii) the market value attached to the dynamic element, (iii) contestability and in particular whether the target company has established itself in the market(s) concerned, (iv) whether there is a realistic prospect of monetising the target business.
  - f. Sixth, a cross-check to consider “the competitive disbenefits of preventing or unwinding the merger” because “*[u]nwise intervention can just as easily lessen competition as an unwise failure to intervene*”.<sup>10</sup>
6. Meta has reservations regarding the CAT’s framework for assessing a loss of dynamic competition, which do not form part of this submission. Notwithstanding these concerns, if the Remittal Group applies this framework and takes account of the withheld evidence and

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<sup>6</sup> *Ibid.*

<sup>7</sup> CAT Judgment, paras. 100-102.

<sup>8</sup> CAT Judgment, para. 103.

<sup>9</sup> CAT Judgment, para. 105.

<sup>10</sup> CAT Judgment, para. 110.

subsequent market developments, the Final Report’s horizontal theory of harm cannot be sustained.

***No static competition between Meta and GIPHY in the UK (CAT’s first condition)***

7. At the time of the Transaction, GIPHY had no UK advertising customers and no UK revenue. The CMA reviewed over 280,000 internal Meta documents, none of which identified GIPHY as a competitive threat (in the UK or in the rest of the world): “*We have not identified evidence from Facebook’s internal documents that it perceived GIPHY as a potential competitive threat in display advertising*”.<sup>11</sup> Similarly, the CMA’s Digital Market Study made no reference at all to GIPHY as a relevant (or potentially relevant) social media or display advertising player (applying the definitions in the study). In fact, at the time of acquisition, GIPHY lacked foundational attributes to compete in advertising, including in the UK:
  - a. GIPHY had no meaningful own user base or inventory with which to scale its advertising business independently. GIPHY is an input provider with almost no users of its own. [X]% of users that interact with GIPHY’s services do so on third-party platforms such as Facebook, Snapchat and TikTok.<sup>12</sup> The corollary is that while third-party platforms could monetize (collectively) up to [X]% of GIPHY’s users, GIPHY could not absent permission and a revenue share agreement. Meta identified this shortcoming in its internal documents, noting that it was an insuperable obstacle to GIPHY achieving profitability on a standalone basis.<sup>13</sup>
  - b. GIPHY also lacked [X].
  - c. Without its own user base, and the cooperation of its application programming interface (“API”) partners, GIPHY was unable to provide advertisers with data showing the return on investment (“ROI”) from specific advertising opportunities. [X]’s business model faced the same difficulties, being “[X]”.<sup>14</sup> GIPHY’s paid alignment products did not demonstrate traditional advertiser ROI: paid alignment did not have optionality for “direct response” enabling the advertiser to track the economic value of an interaction; GIPHY’s API was a search engine rather than an advertising service, meaning that it could not supply basic audience data or control the third-party app environments where the GIF content would run; and even GIPHY’s owned and operated (“O&O”) services did not collect enough data about its users to target advertisements in any way.
  - d. As a result, GIPHY’s advertising business was unsustainable. GIPHY’s inability to attract advertising customers and revenue was so acute that it was forced to offer unsustainable terms to retain existing customers. For example GIPHY offered [X] dedicated personnel, priority ad spend, higher content volumes, and warrants for up to USD [X]. By their nature these terms could not be extended in order to retain other GIPHY customers.

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<sup>11</sup> Remittal Provisional Findings, 7.242.

<sup>12</sup> Main Parties’ Initial Submission dated 19 May 2021

<sup>13</sup> Meta’s internal documents note that [X]. See page 1, Annex 010.05 submitted with the Merger Notice (email of 1 April 2020, sent by N. Blumberger to M. Zuckerberg, S. Sandberg, D. Wehner).

<sup>14</sup> Remittal Provisional Findings, 5.83(a).

8. The Withheld Evidence confirms that neither Meta nor [REDACTED] placed any value on GIPHY's paid alignment business in their purchase prices. [REDACTED] told the CMA that "[REDACTED]".<sup>15</sup>
9. GIPHY was a loss-making business with no path to profitability. Prior to 2020, the company had been operating at a monthly average loss of more than USD [REDACTED]million. By this point, GIPHY was no longer a new company; it had been operating for seven years. GIPHY was sold for USD 315 million after 7 years and total investment of USD [REDACTED] million. Plainly, this is not a context which suggests GIPHY was set for international expansion, including to the UK. The Withheld Evidence confirms the true value of the GIPHY paid alignments business; as a carrot for investors to provide or maintain funding until such point that a buyer for the company could be found. While the CMA sought to rely on evidence from [REDACTED] to demonstrate that other market participants considered it to be possible to monetize GIFs, in fact [REDACTED].<sup>16</sup>
10. The evidence is incontrovertible that there was no pre-Transaction static competition between Meta and GIPHY, whereas competition in the supply of advertising services (specifically display advertising services under the definition in the Final Report) has intensified.
11. The Final Report noted that "...our concerns in the present case are informed by Facebook's significant market power in display advertising. This makes it very difficult for platforms offering innovative new services to enter and compete."<sup>17</sup> As a result of this finding, the Final Report concludes that "even if GIPHY's initial expansion into the UK would have been modest relative to Facebook, this would not undermine GIPHY's importance to the dynamic competitive process."<sup>18</sup>
12. The Final Report's assessment of Meta's alleged significant market power relied on the analysis undertaken in the Digital Market Study (published in 2020 and relying largely on 2019/early 2020 data). This analysis is no longer reliable for assessing the extent of competition in display advertising in mid-2022, given significant developments since this point.
13. The advertising revenue of those rivals cited in the Digital Market Study have outpaced Meta's:

**Table 1: Rivals' Advertising Revenues Outpace Meta's**

	Amazon	Google	Snap	Twitter	Microsoft	Meta
<b>Q1 2022 revenue growth relative to Q1 2021</b>	24%	22%	38%	23%	33%	6%

Source: Companies' SEK 10-K

<sup>15</sup> Remittal Provisional Findings, 6.151

<sup>16</sup> Remittal Provisional Findings, 7.227

<sup>17</sup> Remittal Provisional Findings, 7.186

<sup>18</sup> Remittal Provisional Findings, 7.188

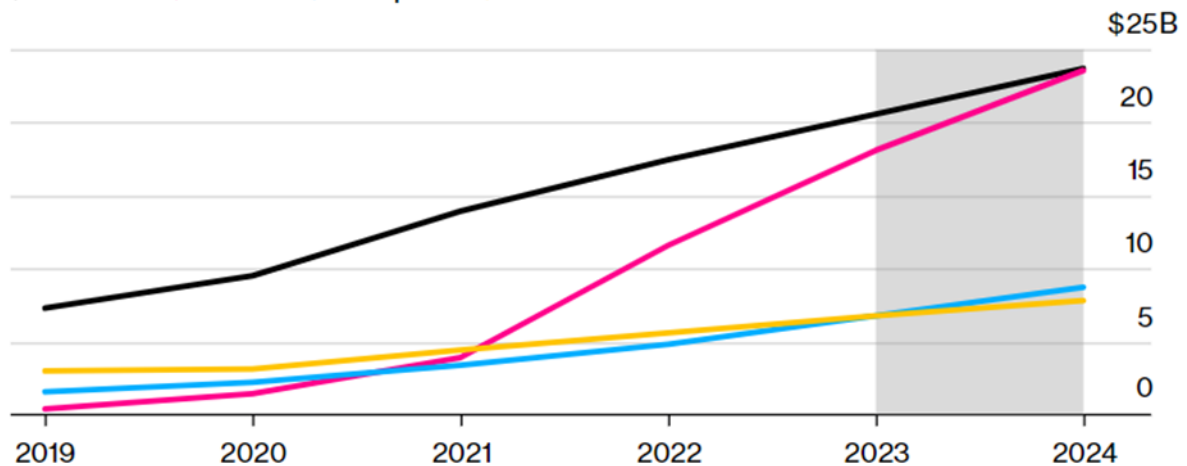
14. It is also evident that barriers to entry are not as high as the CMA found in the Digital Market Study, and relied on in the Final Report, and that other sources of static, potential and dynamic competition have emerged. In the Digital Market Study, the CMA noted in reference to recent entrants: “TikTok has grown quickly, but remains small with a share of 6% and only began displaying digital advertising in the UK in July 2018.”<sup>19</sup> However, TikTok’s global advertising revenues were \$3.9 billion in 2021 and are projected to grow to \$11.6 billion in 2022, \$18 billion in 2023 and \$23.7 billion in 2024 – and are forecast to be on par with YouTube in 2024.<sup>20</sup> This dramatic growth from a recent entrant demonstrates that Meta and others in the display advertising market, using the CMA’s definition, are already facing increased competitive constraints relative to 2020, when the Transaction took place. This stands in stark contrast to the CMA’s conclusions in relation to high barriers to entry in the supply of display advertising in the UK and Meta’s alleged market power.

**Figure 1: Significant Growth in TikTok Ad Revenues**

**#MoneyTok**

TikTok is expected to grow its ad revenue on par with YouTube's in 2024

YouTube TikTok Snapchat Twitter



Source: eMarketer  
All numbers are estimates

15. The rapid growth of Amazon’s ads business to c. \$30 billion revenue in 2021 (which includes “sponsored display ads”<sup>21</sup> and also display ads on Twitch, Prime Video, etc.) is another example of rapid growth by a more recent entrant. There are also a number of new / emerging display advertising competitors which were not considered in the Final Report: Apple, Spotify, Telegram, Deliveroo, UberEats and Tinder.
16. Netflix and Disney+ are planning to introduce Display Ads (as defined by the Final Report) creating both static and potential competition. This intensification of competition in the

<sup>19</sup> CMA Digital Markets Study, 3.209, Box 3.6

<sup>20</sup> <https://www.bloomberg.com/news/features/2022-06-23/tiktok-becomes-cash-machine-with-revenue-tripling-to-12-billion>

<sup>21</sup> See Amazon, Inc, 2021 Fourth Quarter Earnings Report, [https://s2.q4cdn.com/299287126/files/doc\\_financials/2021/q4/business\\_and\\_financial\\_update.pdf](https://s2.q4cdn.com/299287126/files/doc_financials/2021/q4/business_and_financial_update.pdf)

display advertising category dwarfs anything which GIPHY might have achieved within any foreseeable timeframe absent the Transaction.

17. Netflix had approximately 220.67 million paid subscribers worldwide as of the second quarter of 2022<sup>22</sup> (17 million in the UK in Q1 2022<sup>23</sup>) and its top show alone was watched for 1.65 billion hours.<sup>24</sup> The number of Disney+ subscribers reached a new high of 137.7 million in the second quarter of 2022<sup>25</sup> (6.53 million in the UK in Q1 2022<sup>26</sup>). These future entrants clearly have vastly larger audience reaches and potential to disrupt the advertising market, globally and in the UK, than GIPHY and significant potential to disrupt Meta’s position in display advertising.
18. This intensification of competition in the CMA defined display advertising category dwarfs anything which GIPHY might have achieved within any foreseeable timeframe, absent the Transaction. GIPHY’s most ambitious revenue forecasts of \$[§] by 2025<sup>27</sup> are clearly insignificant compared to the competitive constraint imposed on Meta by other recent entrants such as Tiktok and future entrants such as Netflix and Disney+ (and GIPHY’s forecasts should now be considered in the context of a potentially significantly expanded CMA defined UK display advertising market meaning that GIPHY’s potential market share is likely to be even smaller).

***No potential competition from GIPHY in digital advertising in the UK (CAT’s second condition)***

19. Absent evidence of static competition in the UK, in order to substantiate a finding of *dynamic* competition the CMA would need evidence that Meta nonetheless perceived a risk of GIPHY entry. As noted in the CAT Judgment, “[...] *Dynamic competition cannot and should not be considered in isolation from static or potential competition. Both potential and dynamic competition are informed by what is – by the state of static competition.*”<sup>28</sup>
20. Against a backdrop of plummeting external interest in investment, [§] of missed revenue forecasts, muted revenue growth, [§], [§], it would have had to be on a trajectory to achieve exponential growth in the UK in order to pose a potential competitive threat to Meta. To do so, GIPHY would have needed to:
  - a. Obtain significant external funding in the midst of a global pandemic and after narrowly avoiding a “down round” in 2019;
  - b. Enter into revenue share agreements with its major partners (including Meta and Snap) since [§]% of its traffic comes from its API services, of which over half is delivered

<sup>22</sup> <https://www.statista.com/statistics/250934/quarterly-number-of-netflix-streaming-subscribers-worldwide/>

<sup>23</sup> <https://www.statista.com/statistics/529734/netflix-households-in-the-uk/#:~:text=The%20number%20of%20households%20in,almost%20every%20quarter%20since%202014.>

<sup>24</sup> <https://www.cnet.com/tech/services-and-software/netflixs-most-popular-shows-and-movies-ever-ranked-according-to-netflix/>

<sup>25</sup> <https://www.statista.com/statistics/1095372/disney-plus-number-of-subscribers-us/>

<sup>26</sup> <https://www.statista.com/statistics/1109418/disney-plus-subscribers-uk/#:~:text=The%20number%20of%20UK%20households,million%20households%20subscribed%20to%20Disney%2B.>

<sup>27</sup> GIPHY submission ‘2019.09.30 LRP Scenario.pdf’, September 2019; referred to by the CMA in its Remittal Provisional Findings at para. 7.88

<sup>28</sup> CAT Judgment, para. 100.

through Meta services. Absent revenue share agreements GIPHY would not have been able to monetize the overwhelming majority of its traffic; and yet the CMA has found no evidence that any major API partner (let alone Meta) would have agreed to any such agreements.

Today, the prospect of achieving profitability through revenue share agreements is even more remote and GIPHY would be even more reliant on obtaining such an agreement with Meta. GIPHY's monetizable traffic has fallen sharply since the Final Report: (i) GIPHY's revenue models relied on it being able to monetize Meta and Snap traffic, whereas today GIPHY has no access to any meaningful data from Snap (and in any event Snap [REDACTED]).<sup>29</sup> By comparison, nearly [REDACTED]% of GIPHY's API traffic is now attributable to Meta services (up from [REDACTED]% at the time of the Transaction largely as a result of Snap proxying); (ii) only a very low percentage of GIPHY traffic is theoretically monetizable (assuming [REDACTED] wished to reconstitute its revenue business with GIPHY) which leaves no plausible path to profitability; (iii) GIPHY is contractually prohibited from monetizing [REDACTED] traffic (which accounts for c. [REDACTED]% of total API traffic); and

- c. Expand its paid alignment services internationally having found a solution to the reality that it could offer advertisers no meaningful data to measure ROI, and no audiences of its own. Even on GIPHY's own pre-COVID forecasts, it estimated that it might generate GBP [REDACTED] million in the UK in 2022. While this was never close to being a reality, it would have represented [REDACTED]% of the UK's "digital advertising" market;<sup>30</sup>
21. The evidence provided by the Parties to the CMA during its Phase 2 investigation was clear that, in the event that GIPHY raised sufficient capital to enter the UK market, "*GIPHY's share would have been extremely small - at the very most 0.35% - and the evidence suggests its realistic share was probably far less than this*".<sup>31</sup> Alex Chung, Chief Executive Officer of GIPHY, informed the CMA that "*Neither I, nor any members of GIPHY's senior management believed that international expansion represented a realistic, or even possible, opportunity for the company*",<sup>32</sup> not least because it "*had not managed to prove the assumptions in [its] business model even within the United States*", and "*did not have the capacity to invest in the necessary increased revenue staff, let alone other additional areas such as international moderation*".<sup>33</sup> The barriers preventing GIPHY's international expansion were myriad and included tax considerations, international ad regulations, GIPHY's failure to prove the assumptions of its business model, lack of capacity, and insufficient inventory. It is wholly unrealistic to assert that GIPHY could have overcome each of these barriers and had any prospect whatsoever of establishing a UK business and consequently gone on to pose a genuine competitive threat to Meta, on any reasonable timeframe.

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<sup>29</sup> This is due to [REDACTED]. GIPHY also expects Snap will move entirely away from using its content once it has sufficiently developed Gfycat's, [REDACTED].

<sup>30</sup> Remittal Provisional Findings, 5.156

<sup>31</sup> Report by Frontier Economics on GIPHY International Expansion Prospects, October 2021.

<sup>32</sup> First Witness Statement of Alex Chung

<sup>33</sup> First Witness Statement of Alex Chung

22. The CAT agreed with this position. It stated that it would not have been open to the CMA to find that GIPHY would have received sufficient cash through investment so as to enable it to dramatically expand or change direction.<sup>34</sup>
23. The Withheld Evidence corroborates the Parties' submissions. After the publication of the Phase 2 Provisional Findings, Meta's external counsel became aware that [X] shortly after it acquired the company. Despite possessing all the resources necessary [X], if it had valued this opportunity, [X] "[X]".<sup>35</sup> Since the CMA's disclosure of the un-redacted Remittal Provisional Findings, it has become clear that [X] was something they felt they "[X]".<sup>36</sup> Crucially, this statement by the [X] is almost exactly aligned with the statement by the co-founder of GIPHY that "[X]".<sup>37</sup> Mr Chung told the CMA at the Main Party Hearing that his role was "*pitching this highly improbable but possible path to investors and employees. You'll see in our pitch decks, our financial forecasts, our management presentations and all the conversations with employees...of this one path...however improbable the assumption that...we will most likely fail*".<sup>38</sup> In other words, the co-founders of both of the largest GIF providers [X].
24. It is clear from the Withheld Evidence that [X] and, as highlighted above, market developments demonstrate intensified static (e.g., TikTok) and potential competition (e.g., Netflix, Disney+) in the supply of display advertising in the UK.

**No prospect that the alleged dynamic competition would manifest within a relevant timeframe (CAT's third condition)**

25. Witness evidence from GIPHY set out above demonstrates that its entry into the UK digital advertising category was inconceivable at the time of the Transaction.
26. The Withheld Evidence corroborates GIPHY's witness evidence. [X] even less successful than GIPHY's meagre achievements. As the CMA acknowledged: "[X]".<sup>39</sup>
27. The Remittal Provisional Findings appear to assume that significant competition from paid alignments was inevitable. The Remittal Provisional Findings therefore construe [X] evidence [X] as corroborating evidence of the importance of GIPHY's significant competitive threat.<sup>40</sup> However, the conclusion was misguided. [X] foresaw [X] because the model [X]. It is incumbent upon the CMA to use the remittal investigation to understand *why* [X] [X], despite the extensive resources available to [X], and the *consequences* of this for the horizontal theory of harm. It is also incumbent on the CMA to ascertain what progress [X] has made [X], and whether Snap [X]. In Meta's submission, the conclusion is inescapable that advertisers have viewed [X] in the same way as they viewed GIPHY's – a novel idea, but fundamentally uncompetitive when compared to other forms of online advertising which offer genuine engagement with users. This is consistent with the CMA's

<sup>34</sup> CAT Judgment, paragraph 82.

<sup>35</sup> Phase 2 Provisional Findings, 7.141.

<sup>36</sup> Remittal Provisional Findings, 7.227

<sup>37</sup> First Witness Statement of Alex Chung

<sup>38</sup> CMA Transcript of Hearing With GIPHY on 15 June 2021, p.8,17-22

<sup>39</sup> Remittal Provisional Findings 9.91(c)

<sup>40</sup> Remittal Provisional Findings, 9.91(c). Google/Tenor told the CMA that revenue generated by a paid alignments model was [X], with "[X]".



findings on Holler’s and Gfycat’s prospects of successfully launching GIF-based advertising: “[✂].”<sup>41</sup>

28. As the CAT correctly surmised: *“At the end of the day, the significance of a dynamic element turns on the manner in which it can be monetized. [...] . If, on the other hand, the dynamic element – whilst a “good idea” – is no more than that, then the acquisition of Firm A by Firm B is less likely to signify in terms of impairment to dynamic competition”*.<sup>42</sup>

***The Final Report identified the wrong competitive dynamic (CAT’s fourth condition)***

29. The fourth limb of the CAT’s framework considers *“an assessment of the market position of the merging parties in light of the above factors, and of the competitive dynamic between them”*. But as the prior limbs show, there was no broader competitive dynamic between the merging parties. Meta’s internal documents do not discuss GIPHY as a competitor in any context.
30. However, the Final Report overlooked a very different competitive dynamic, which was emerging, significant, and of which there was compelling evidence already on file. Snap’s acquisition of Gfycat was evidence of vibrant, ecosystem level competition between Google, Snap and Meta. Each of the three largest GIF providers has now been acquired by larger companies. The series of acquisitions is a form of ecosystem-to-ecosystem competition, with digital ecosystems acquiring GIF services as bolt-on features to their services. This was, and remains, the role of the GIPHY business. The Final Report concedes – and the CAT observed – that there was no evidence of competitive interaction between Meta and GIPHY in advertising in either Party’s internal documents.
31. The fact that Snap wanted to keep its acquisition of Gfycat a secret suggests that it had an incentive for Meta and the rest of the market not to know about their intentions for the business. Meta/GIPHY and Google/Tenor are now aware that investments have been made into Gfycat, and that the service is being improved. The CMA must therefore accept that Snap intended there to be, and that there is, as a result of this acquisition, a dynamic competitive effect whereby Meta/GIPHY and Google/Tenor will need to invest more heavily to compete with Snap/Gfycat. In fact, requiring divestment would put GIPHY at a disadvantage vis-a-vis its two other vertically integrated rivals (whose acquisitions were unchallenged by the CMA). This is relevant to the requirement stipulated in the CAT Judgment that the CMA should cross-check its conclusions and ensure that any competitive disbenefits of preventing or unwinding the Transaction are properly considered.<sup>43</sup>
32. Market developments since the Final Report are consistent with this evidence. Meta has continued to respond to dynamic competition in advertising; there has been no reduction in competitive pressure or scaling back in innovation as a result of the Transaction; if anything, since the Transaction, Meta has been under considerable additional pressure from rapidly expanding rivals. Yet the source of this competition has not been Google’s Tenor or Snap’s Gfycat - the companies that the CMA has focused on – but companies like TikTok, YouTube, Apple, Amazon, Netflix, Disney+ and others.

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<sup>41</sup> Remittal Provisional Findings, para. 9.101.

<sup>42</sup> CAT Judgment, para. 109(4)

<sup>43</sup> CAT Judgment, para. 110.

***The hypothetical competitive dynamic between paid alignments and display advertising in the UK was a “dud” (CAT’s fifth condition)***

33. The CAT correctly observed that: “*the number of identifiable dynamic elements that actually succeed will be vastly outnumbered by the failures. And, [...] many, or even most, failures will not have any effect – one way or the other – on competition*”.<sup>44</sup> The CAT identified four non-exhaustive indicators that a hypothetical competitive dynamic may be a dud:

a. **The motives and thinking of the merging firms.**<sup>45</sup> The absence of evidence that the acquirer was seeking to “*kill off a rival*” would suggest a “*dud*” competitive dynamic. Similarly, evidence that GIPHY was “*looking for financial backing so as to take forward a novel business development*” would be “*an indicator that the merger may in fact be pro-competitive, not impairing dynamic competition, but facilitating it*”. The CAT correctly identified that there was “*no evidence to suggest that Meta’s motivation for purchasing GIPHY was to eliminate GIPHY as a competitor in any advertising market or to foreclose or cut off rivals’ access to GIPHY’s products or services. There was no suggestion that either horizontal or vertical foreclosure was part of Meta’s motivation for the Merger*”.<sup>46</sup>

b. **The market value attached to the dynamic element.** The CAT postulated that “*huge interest in [GIPHY], because of its plans, from not just [Meta] but others*” would indicate a valuable dynamic potential”. It follows that the absence of such interest would suggest there is no competitive dynamic worth preserving. In the event, GIPHY instructed a world-leading investment bank, JPMorgan, to contact potential purchasers. Of the companies approached, [REDACTED] expressed no interest. Each of Adobe, Amazon, Apple, Bytedance, Kauishou, Snap and Twitter indicated their willingness to discuss the opportunity but none of these discussions proceeded beyond initial contacts. Only Snap advanced beyond expressing initial interest, and valued the GIPHY business at substantially less than GIPHY’s existing shareholders were prepared to accept. The CMA has not suggested a single other third party who was not given the opportunity to acquire GIPHY who may have been interested in doing so.

Disclosures subsequent to the Provisional Findings confirm that Snap valued GIPHY at just \$142 million.<sup>47</sup> Moreover, Snap submitted evidence - originally withheld from Meta - [REDACTED]. [REDACTED].<sup>48</sup> [REDACTED].<sup>49</sup> [REDACTED].

c. **Contestability**, including whether the target business “*has successfully navigated [...] barriers [to entry], and established itself in the market*” such that it was a “*valuable property which should not – without consideration – be suppressed through merger*”.<sup>50</sup> GIPHY’s Senior Director of Finance and Chief of Staff, Lauren Wilcox,

<sup>44</sup> CAT Judgment, para. 108

<sup>45</sup> CAT Judgment para 109(1)

<sup>46</sup> CAT Judgment para 13(2)

<sup>47</sup> PF 6.137.

<sup>48</sup> [REDACTED].

<sup>49</sup> The CMA’s statements in the horizontal TOH working paper that GIPHY would have been in a good position to be acquired by a third party are misleading given what the CMA knew at the time. The CMA had information to show that Snap’s offer for GIPHY would not have been accepted and [REDACTED].

<sup>50</sup> CAT Judgment para 109(3)

has set out the “*likely insurmountable*”<sup>51</sup> challenges that GIPHY faced before it could establish a sustainable business model even in the United States, much less enter the UK market and its “*repeated failures*” to hit its revenue targets. In circumstances where GIPHY, as the CAT found, was “*holding its head above water and no more,*”<sup>52</sup> it is impossible reasonably to conclude that GIPHY had established itself on any advertising market, and it was not even active in the UK. Additionally, the Final Report persistently, and erroneously, equates users on GIPHY’s API partners’ services as demonstrating that GIPHY had a significant user base. GIPHY’s users on its O&O services were negligible and it had not developed its own significant user base to which it could advertise (unlike other potential entrants such as Netflix and Disney+).

- d. **Whether there is a realistic prospect of monetising the target business.** As the CAT surmised “*the significance of a dynamic element turns on the manner in which it can be monetized*”, absent which “*the dynamic element - whilst a ‘good idea’ - is no more than that*”.<sup>53</sup> As Meta has set out above, none of [REDACTED], [REDACTED] or GIPHY (pre-merger) have yet succeeded in developing a realistic and workable plan for the profitable, [REDACTED]. Withheld Evidence submitted by Tenor explained that [REDACTED]. The conclusion is inescapable that, 2 years after Snap bought Gfycat, and 4 years after Google bought Tenor, if GIFs could be [REDACTED], at least one of these sophisticated advertising companies would have done so or be well on the way to doing so within a foreseeable timeframe (*i.e.*, less than 5 years as an outer bound).

As such, on each of the CAT’s metrics, it must reasonably be concluded that the form of dynamic competition postulated in the Remittal Provisional Findings was a “*dud*”.

### **The Vertical Theory of Harm**

34. The Withheld Material and developments since the Final Report demonstrate that there was no basis to the Final Report’s vertical effects theory of harm.

#### ***Competition is intensifying, there are now two plug-in replacements for GIPHY – Tenor and Gfycat – and Meta will have no ability and/or incentive to foreclose rivals***

35. In the pre-Transaction *status quo*, the CMA considered that there were two credible GIF providers: GIPHY and Tenor. However, the Withheld Material concerning Snap’s plans for Gfycat suggests that in the [REDACTED] there will be a third credible competitor in this space [REDACTED]. Thus, as compared with the CMA’s counterfactual, upstream competition has in fact increased. This market development is fatal to the vertical theory of harm set out in the Final Report where the CMA states “[a]side from Tenor, no other GIF providers appear to be able to meet the requirements of large social media platforms at present or in the near future”,<sup>54</sup> noting also that “[REDACTED]”.<sup>55</sup>
36. The Snap/Gfycat acquisition highlights why the CMA’s view is fundamentally misguided: the acquisition of upstream content providers is a form of competition in downstream advertising markets (including in the display advertising market in the UK as defined in the

<sup>51</sup> First Witness Statement of Lauren Wilcox

<sup>52</sup> CAT Judgment, para 174(1)

<sup>53</sup> CAT Judgment para 109(4)

<sup>54</sup> Remittal Provisional Findings, 8.5.

<sup>55</sup> Remittal Provisional Findings, 8.27(a)

Final Report). That competition is intensifying: Google made the first move, acquiring Tenor. Meta followed with GIPHY, and immediately after that Snap acquired Gfycat. Google, Meta, and Snap all compete in advertising, even in the more narrow digital advertising or display advertising spaces defined by the CMA. Improving the user-facing side of their services is an aspect of that competition. Buying and integrating upstream content providers—here GIF search engines—is clearly part of that competition, because ownership of, and vertical integration with, the GIF provider enables Google, Meta, and Snap to create better user experiences on their services more quickly and effectively than is possible on an arm’s length basis. This dynamic is an example of welfare gains from efficient vertical integration that result in an increase, not a reduction, in downstream competition. In other words, actual competition in the CMA’s digital advertising market has increased since Facebook acquired GIPHY by increasing user engagement through GIFs, (if and to the extent that GIFs are and remain a popular user tool). Moreover, the improvements in competition have not occurred at the cost of non-vertically integrated players since each of Meta/GIPHY, Google/Tenor and Snap/Gfycat have continued to offer content to third parties without restriction.<sup>56</sup>

37. The evidence withheld on Snap’s acquisition of Gfycat demonstrates that there will be a third plug-in replacement for GIPHY and Tenor, which can be used “...[redacted]”.<sup>57</sup> Gfycat confirmed that “[redacted]”<sup>58</sup> and the Final Report reports Snap’s intentions “[redacted]”.<sup>59</sup>
38. Gfycat is now owned by a well-resourced major social media player.<sup>60</sup> It already has [redacted] and it is [redacted]. Snap can also, and no doubt has been, addressing Gfycat’s content moderation issues, developing its brand partnership and its IP legal protection.<sup>61</sup> Statements made by Nir Blumberger (Meta’s Head of EMEA Corporate Development) in early 2020<sup>62</sup> about the inferior quality of Gfycat and that using Gfycat would be “*almost like building from scratch*” are no longer relevant. The Final Report additionally relies on out-dated statements from Meta internal correspondence noting: “*There is need for scale, breadth, and content moderation. [redacted]*”, and “[redacted]”<sup>63</sup> without taking into consideration recent market developments since 2020. Snap has also confirmed that “[redacted]”<sup>64</sup> and therefore the benefits of Snap’s investment in Gfycat are available to all third parties. Furthermore, Snap’s stated intention to [redacted] also contradicts the statement in the Provisional Findings that it is “...[redacted]”<sup>65</sup>, yet the significance of Gfycat’s statement on competition is not meaningfully addressed in the Final Report. Its intention is plainly stated and therefore the Final Report’s

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<sup>56</sup> See Parties’ Response to Provisional Findings dated 2 September 2021 at paragraph 1.24.

<sup>57</sup> Remittal Provisional Findings, 9.78.

<sup>58</sup> PF 5.56.

<sup>59</sup> Remittal Provisional Findings, 5.60.

<sup>60</sup> For example, Snap’s first quarter financial results from 2022 evidence that its revenue increased 38% year-over-year to \$1,063 million and that its Daily Active Users increased 18% year-over-year to 332 million. See [here](#) for more information.

<sup>61</sup> Remittal Provisional Findings, 5.57.

<sup>62</sup> Remittal Provisional Findings, 7.164(b)

<sup>63</sup> Remittal Provisional Findings, 8.18.

<sup>64</sup> Remittal Provisional Findings, fn 1125.

<sup>65</sup> PF 9.61.

concerns about the availability of substitutes evidently are not valid given Gfycat will be an effective competitor to GIPHY.

39. GIPHY, Tenor, and Gfycat are all currently providing GIF search and content services to third parties. This means that now there are three examples (Tenor, GIPHY, Gfycat) of vertical integration, none of which have led to foreclosure. Meta committed publicly on Day 1<sup>66</sup> and then offered to formally commit to the CMA in March 2021 to keep GIPHY free and open, including supporting any partner’s ability to completely anonymize its users’ search requests, since Meta has no ability or incentive to foreclose GIPHY’s partners (and as explained below made the same commitment to the Austrian Cartel Court (the “ACC”) which was affirmed by the Supreme Court). As mentioned, Snap has confirmed that “[X]”.<sup>67</sup> The existing position is that Gfycat offers third parties access to its content and the Final Report provides no evidence that this is likely to change.
40. Unsurprisingly, given the minimal incremental cost of keeping GIPHY open to other API partners and the ability to maximise GIPHY’s value by maintaining similar terms of service, Meta considers the most profitable approach – which is entirely consistent with Meta’s public statements, its internal documents, its March 2021 offer to the CMA to make a formal commitment, and its subsequent formal commitment accepted by the ACC (and affirmed by the Austrian Supreme Court) – is to keep GIPHY open and available to third parties. The Final Report’s findings that: “*a range of foreclosure mechanisms are available to Facebook, including complete refusal of supply, degrading the terms of supply of current API/SDK services, reprioritising innovation and development of GIPHY’s API/SDK services towards the requirements of Facebook’s own social media services over those of other social media platforms, and requiring data as a condition of supply*” are clearly unfounded, especially in light of the recent market developments.<sup>68</sup> Indeed, the CMA has reviewed nearly three hundred thousand documents, none of which indicated Meta had any incentive or intention to engage in a foreclosure strategy.<sup>69</sup>
41. Furthermore, Meta was deprived of the opportunity to explain how Snap’s acquisition of Gfycat impacted the Final Report’s conclusions regarding upstream market power in the supply of GIFs. The CMA has a duty on remittal to consider how Snap’s acquisition of Gfycat would affect market shares in the GIF market as of today and on a forward-looking basis (and certainly examining trends since the Final Report was published). Snap’s intention to improve Gfycat’s offering, [X] clearly has implications for market shares in the future.
42. **Subsequent market developments.** As discussed further below, the CMA must on remittal also examine Snap’s progress with improving Gfycat’s content and whether it considers any longer that it could be foreclosed from accessing GIFs and stickers today in a manner which causes material detriment to its services.

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<sup>66</sup> See <https://about.fb.com/news/2020/05/welcome-giphy/>: “We’ve used GIPHY’s API for years, not just in Instagram, but in the Facebook app, Messenger and WhatsApp. GIPHY will continue to operate its library (including its global content collection), and we’re looking forward to investing further in its technology and relationships with content and API partners. People will still be able to upload GIFs; developers and API partners will continue to have the same access to GIPHY’s APIs; and GIPHY’s creative community will still be able to create great content.”

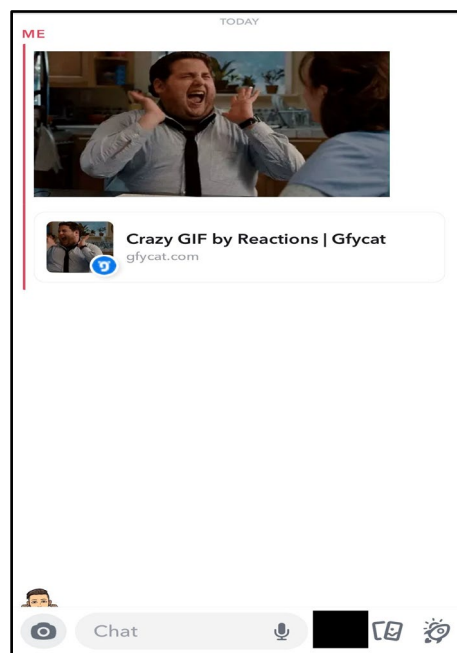
<sup>67</sup> Remittal Provisional Findings, fn 1125.

<sup>68</sup> Remittal Provisional Findings, 8.110.

<sup>69</sup> See Parties’ Response to Provisional Findings dated 2 September 2021 at paragraph 7.12.

43. Market developments since the Final Report suggest that Snap has already introduced improvements to the Gfycat service, consistent with GIPHY holding no upstream market power. Publicly available evidence indicates that Snap has added GIFs to their chat feature and all of the content is from Gfycat. The service is branded “*Gfycat*” and there is zero reliance on Giphy, *i.e.*, Snap is now using Gfycat on its services contrary to prior position in the Final Report and the statements previously made by the CMA (see **Figure 1** included below).<sup>70</sup>

**Figure 2: Gfycat GIFs available on Snap**



*Source: Screenshot taken on 21 July 2022*

44. Moreover, Gfycat GIFs are now used in Slack messaging demonstrating that actual competition is actually intensifying with the emergence of equally effective competitors with Snap’s acquisition and investments into Gfycat.<sup>71</sup>

***Withheld Material reaffirms that GIFs are not an important input to social media services***

45. The evidence gathered by the CMA clearly reaffirms Meta’s position that GIFs are not an important input to social media services and that therefore the merged entity would have no ability to foreclose. Specifically, a number of alternative social media providers were equivocal on the importance of GIFs to their business models. [REDACTED] characterised GIFs as “*nice to have*” but “*not critical or foundational*”.<sup>72</sup> [REDACTED], Baidu and Zendesk considered GIFs to have “*low to medium importance*” on their services as drivers of user engagement, and in fact Slack is now using Gfycat.<sup>73</sup> [REDACTED] considers its non-GIF features to be “*more*

<sup>70</sup> PF fn 304.

<sup>71</sup> <https://gfycat.com/slack>

<sup>72</sup> Remittal Provisional Findings, 8.86

<sup>73</sup> Remittal Provisional Findings, 8.85-8.87 and <https://gfycat.com/slack>

important” than GIFs.<sup>74</sup> Zoom stated that having a robust and diverse GIF selection only helps them to compete effectively “to some degree”.<sup>75</sup>

46. [REDACTED] informed the CMA that GIFs “are very important for user expression” on its platform. However only [REDACTED].<sup>76</sup> [REDACTED] claimed that GIPHY’s key competitive advantage was in “delivering customer satisfaction, and that if searches do not reflect a specific cultural reference or interest the user is looking for, the user would be unlikely to select a GIF”.<sup>77</sup> This is contradicted by [REDACTED]<sup>78</sup>[REDACTED]<sup>79</sup>

### Third Party GIF Volumes

Platform	GIFs (% of content)	GIFs (volume)	FR Reference
[REDACTED]	[REDACTED]	[REDACTED]	8.82
[REDACTED]	[REDACTED]	-	8.83
[REDACTED]	[REDACTED]	[REDACTED]	8.86

### ***Evidence regarding Snap’s investment in Gfycat undermine the Final Report’s assessment of Meta’s incentives to engage in a foreclosure strategy***

47. The existence of another significant and growing rival (Gfycat), corroborated by Snap’s future plans mentioned above affects Tenor’s incentives and behaviour if Meta/GIPHY were hypothetically to foreclose.
48. Even if any vertical foreclosure took place, API partners and/or Meta’s competitors could rely on Tenor (who would be constrained by actual and potential competition from Gfycat) and increasingly over time also rely on Gfycat. The Remittal Provisional Findings state that: “Tenor appears to possess a comparable degree of capability to GIPHY”,<sup>80</sup> and is informed by Tenor that “[REDACTED]” [REDACTED].<sup>81</sup> The Final Report contends that “[REDACTED]”,<sup>82</sup>. However, recent market developments – including Gfycat’s new partnership with Slack<sup>83</sup> – demonstrate that Gfycat is developing (with Snap’s investments) into a stronger competitor to both Tenor and GIPHY, affecting the structure of the market. This crucially undermines the Final Report’s fundamental arguments on vertical concerns and should form a key part of the CMA’s remittal investigation.
49. Snap itself is one of Meta’s most significant competitors and one of the few “social media” (using the definition in the Final Report) providers who indicated that GIFs were important

<sup>74</sup> Remittal Provisional Findings, 8.85

<sup>75</sup> Remittal Provisional Findings, 8.85

<sup>76</sup> Remittal Provisional Findings, 8.82

<sup>77</sup> Remittal Provisional Findings, 8.83

<sup>78</sup> Remittal Provisional Findings, 5.60

<sup>79</sup> PF 5.56

<sup>80</sup> Remittal Provisional Findings, 5.62

<sup>81</sup> Remittal Provisional Findings, 5.66

<sup>82</sup> Remittal Provisional Findings, 7.164(b)

<sup>83</sup> <https://gfycat.com/slack>

to its business. Meta's ability to foreclose Snap's access to GIFs is removed as a result of Snap's acquisition of and investment in Gfycat. This reduces the incentives to engage in a foreclosure strategy as any such strategy could only affect rivals that are not vertically integrated with a GIF library, *i.e.*, not Snap and not YouTube.

50. The development of Gfycat also affects foreclosure incentives with respect to non-vertically integrated API partners as well. The CMA emphasised the importance of there being a range of alternative GIF providers, such that API partners have a choice between two providers, and the providers act as competitive constraints upon each other. Pre-Transaction it considered that there were two providers offering high-quality and largely comparable GIF services – GIPHY and Tenor. Absent the development and improvement of Gfycat, if Meta were to foreclose access to GIPHY, then in the CMA's view other social media providers would only be able to rely on Tenor to access a high quality GIF library. The Final Report considered that Tenor would then have lower incentives to offer an attractive proposition to its API partners, as its partners have no other significant alternatives – *i.e.*, there is no longer a competitive constraint on Tenor.<sup>84</sup> Therefore, allegedly, the quality of GIFs on non-Meta services could degrade as a result of Tenor facing no competitive constraint and therefore users might switch from rivals relying on Tenor to Meta.
51. Where there are now (or very soon will be) three comparable GIF providers as a result of the investments of Snap in Gfycat, (which arose in response to Meta's acquisition of GIPHY) the dynamics and hence incentives change significantly. The Remittal Group must consider whether competition in the market for the supply of GIFs is significantly lessened relative to the pre-Transaction conditions. The pre-Transaction conditions of competition included two GIF providers competing against each other. Since, as a result of the Transaction, Snap has acquired and improved Gfycat, even if GIPHY were no longer present in the market the competitive offering of GIF libraries available to API partners is not materially worsened.
52. The hypothetical loss of one GIF provider, *e.g.*, GIPHY, would not remove all competitive constraints on the remaining GIF providers in the market – as there would still be two sufficiently high-quality GIF providers competing. This is the same competitive conditions as pre-Transaction. If, in response to Meta removing or degrading third-party access to GIPHY, Tenor degraded its quality of service, then API partners would switch to Gfycat or vice versa. Therefore even without GIPHY, Tenor and Gfycat would continue to have incentives to compete and offer the highest quality GIF service, or risk losing partners to a rival (as GIPHY and Tenor did, pre-Transaction). As such, if Meta were to engage in a foreclosure strategy, it is much less likely to gain from rivals suffering degraded quality and users switching to Meta relative to a scenario where Gfycat remained a materially inferior provider. The potential benefits of any foreclosure are entirely removed (or at minimum significantly reduced) if there exist two players of sufficient comparability in the market constraining each-other. This applies not only to static competition but also potential and dynamic competition between GIF providers.
53. Equally, and finally, if Meta were in some way able to choose to only develop GIPHY in a way that benefitted the Meta platforms, but not third parties, these third parties could negotiate with one of the alternative GIF providers to ensure they have access to a GIF provider that meets their needs.

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<sup>84</sup> Remittal Provisional Findings, 8.29



***The Withheld Material demonstrates that the Austrian remedy was more than sufficient to address any vertical foreclosure concerns***

54. On 2 February 2022, the ACC cleared the Transaction subject to remedies addressing the vertical theories of harm (the “**Remedies**”). The competitive concerns raised by the Austrian Statutory Parties (Austrian Federal Competition Authority – “**AFCA**” – and Federal Cartel Prosecutor – “**FCP**”) as well as by the CMA, *i.e.*, that the Transaction (i) would impair horizontal competition in digital advertising, and (ii) would enable Meta to accumulate data, were dismissed in their entirety. The ACC also found that any conceivable concerns that Meta might deny rivals access to GIFs were fully resolved by the Remedies.
55. On 3 March 2022 the AFCA appealed the ACC’s conditional clearance decision to the Austrian Supreme Court and Meta prevailed. The Austrian Supreme Court dismissed the appeal in full noting that the ACC’s decision was based on sufficient and correct findings. Notably, the AFCA did not identify any horizontal competition concerns in its report.
56. The Austrian remedy package serves to address potential remaining vertical foreclosure concerns that Meta will deny rivals access to GIFs. The remedy package resolves any potential foreclosure concerns because it guarantees GIPHY’s partners non-discriminatory API access and access to any new GIFs in GIPHY’s library. Specifically, these remedies are:
1. ***Non-discriminatory access to GIPHY’s services*** (“Remedy I”)
    - For a period of max. 5 years, Meta commits to maintain non-discriminatory access to GIPHY’s API for existing API partners and new API partners in the area of social media, based on the same terms and conditions as before the Transaction.
    - This access will not be conditional upon sharing user-specific information with Meta. Proxying and caching continue to be allowed.
  2. ***Building up an additional alternative GIF provider*** (“Remedy II”)
    - For a period of max. 7 years, alternative GIF providers which meet certain objective criteria will be granted access to GIPHY’s GIF library via the GIPHY API, including full access to GIPHY’s public search index. This ensures their access to an up-to-date, moderated and thus high-quality GIF library.
    - This access will also be non-discriminatory and subject to the same terms and conditions for API Partners that applied before the Transaction.
    - The prohibition to commingle is removed from the current GIPHY API Terms of Service, allowing eligible alternative GIF providers to serve their own GIFs with those of GIPHY to their API partners.
    - Meta commits to not enter into exclusive licensing agreements with content providers in the future to allow content providers to further distribute their content.
    - Access under this remedy will also not be conditional upon sharing user-related information with Meta and those eligible will continue to be free to use proxy servers or caching.

57. The remedy package will (only) become effective if the Transaction has been cleared in all jurisdictions and is therefore allowed to proceed. Meta had proposed substantially the same remedy during the CMA's Phase I investigation. The CMA was at this time already aware of Snap's acquisition of Gfycat, [§]. In light of Snap's intentions for and progress with developing Gfycat, which must be examined in detail on remittal, it is clear that the Remedy the Parties proposed (and accepted by the Austrian Supreme Court following an appeal from the AFCA) would have been sufficient to ensure no SLC arises as a result of any vertical foreclosure.
58. As mentioned, the findings in the Final Report that: "*a range of foreclosure mechanisms are available to Facebook, including complete refusal of supply, degrading the terms of supply of current API/SDK services, reprioritising innovation and development of GIPHY's API/SDK services towards the requirements of Facebook's own social media services over those of other social media platforms, and requiring data as a condition of supply*"<sup>85</sup> are clearly unfounded, and would have been resolved by the remedies accepted by the Austrian Supreme Court.

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<sup>85</sup> Remittal Provisional Findings, 8.110.