COMPETITION APPEAL TRIBUNAL

SUMMARY OF APPLICATION UNDER SECTION 120 OF THE ENTERPRISE ACT 2002

CASE No. 1429/4/12/21

Pursuant to rules 14 and 26 of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) (the "Rules"), the Registrar gives notice of the receipt on 23 December 2021 of an application for review ("the Application") under section 120 of the Enterprise Act 2002 (the "Act") by Meta Platforms, Inc. (the "Applicant") of the Competition and Markets Authority's (the "Respondent") decisions which are contained in a report dated 30 November 2021 in relation to the completed merger between the Applicant and GIPHY, Inc. ("GIPHY") (the "Decision"). The Applicant is represented by Latham & Watkins (London) LLP of 99 Bishopsgate, London EC2M 3XF (Reference: Martin Davies / David Little / Greg Bonné).

The Applicant was founded in 2004 and, until 28 October 2021, it was known as Facebook, Inc. The Applicant is the parent company of a group which offers a wide range of online products and services worldwide, including Facebook, Instagram, Messenger, WhatsApp, Oculus, Portal and Workplace.

GIPHY was founded in 2013 with headquarters in New York. It operates an online database and search engine which allows users to search for and share GIFs (Graphic Interchange Format image files) and GIF stickers (GIFs with a transparent background). GIPHY was a company largely owned and funded by its venture capital investors, and its limited revenues came from "Paid Alignment", a form of advertising model which gives advertisers the ability to align their GIFs with popular search terms or to insert their GIFs into a 'trending feed' in exchange for a fee.

According to the Application, the Applicant acquired GIPHY on 15 May 2020 (via the Applicant's wholly owned subsidiary, Tabby Acquisition Sub, Inc.) (the "Merger"). The Respondent requested information about the Merger on 29 May 2020, issued a notice under section 109 of the Act on 5 June 2020 confirming its intention to investigate and made an initial enforcement order under section 72(2) of the Act on 9 June 2020 in connection with the Merger. On 25 March 2021, the Respondent decided to refer the Merger to its chair for the constitution of an inquiry group, which it did on 1 April 2021. The Respondent notified the Applicant of its Provisional Findings on 12 August 2021, together with a Notice of Possible Remedies. On 30 November 2021, the Respondent notified the Applicant of its Decision on the reference.

The Applicant states that the Respondent concluded in the Decision that the Merger had given rise to a "relevant merger situation" and will give rise to a substantial lessening of competition ("SLC") within a market for services in the UK in two forms:

1. The "Horizontal SLC" in the supply of display advertising in the UK.

2. The "Vertical SLC" by reason of the potential foreclosure of GIFs from GIPHY as an input to competitors of the Applicant on social media markets in the UK.

The Applicant further states that the Respondent determined that, to remedy either or both of the SLCs which it had found, the Applicant should be required to divest itself of GIPHY to a purchaser with an active commitment to developing and providing GIF-based advertising in the UK and to take a number of further measures for the purpose of unwinding the Merger. These include transferring a specified minimum amount of cash to GIPHY and entering into an agreement with GIPHY for the supply of GIFs.

In summary, the Applicant challenges the Respondent's Decision as unlawful and falls to be quashed on six grounds:

1. Ground 1: As to the Respondent's finding that the Merger will result in the Horizontal SLC:

(a) The Decision does not contain any finding that it is probable that GIPHY would have become a meaningful competitor to the Applicant on any UK advertising market in the future; it seeks to rely instead upon a concept of "*dynamic competition*". The Respondent misdirected itself in law as to the meaning of an SLC in section 35(1)(b) of the Act and/or misapplied that test in finding that a "substantial" lessening of competition could arise from a loss of "dynamic" competition without an assessment of whether: (i) GIPHY would, on the balance of probabilities, have become a significant competitive threat on a relevant UK advertising market(s); and (ii) the Applicant (or other competitors) would, on a balance of probabilities, have responded to any such threat by materially changing their own competitive conduct or investment decisions on any such market(s) within a reasonable period; and/or

(b) If, contrary to the above, the Decision does reach such a finding, the Respondent's finding was one which was not reasonably open to it and/or was made without making reasonable prior inquiries or assessments that any reasonable regulator would have made.

2. Ground 2: In relation to market power:

(a) The findings on which the Respondent founds its theory for the Horizontal SLC contradict the Respondent's definition of the relevant market on which it alleges the Applicant competes. Logically, GIPHY's Paid Alignment advertising must either compete in the same market as the Applicant's advertising or in a different market:

(i) If GIPHY's advertising competes in a different market to the Applicant's advertising then the Decision could not have reasonably maintained its finding of the Horizontal SLC.

(ii) If, on the other hand, GIPHY's advertising competes in the same advertising market as the Applicant's then this would contradict the Decision's definition of the "display advertising" market in which it is alleged that the Applicant competes. The finding that the Applicant has market power is based upon a definition of the relevant advertising market which no rational decision-maker could have reached consistently with the other findings in the Decision.

(b) Further and in any event, the Respondent's finding of market power on the part of GIPHY was irrational and/or failed to take into account relevant considerations as to GIPHY's power over price.

3. Ground 3: The Respondent's counterfactual does not rationally follow from the Respondent's findings of fact, is inadequately specified, and/or has been arrived at without the Respondent having taken reasonable steps to acquaint itself with plainly relevant information or make necessary factual findings.

4. Ground 4: The Decision is procedurally flawed in that:

(a) The Respondent acted unfairly and/or in breach of its duty to the Applicant under section 104 of the Act in connection with its disclosure of, and evaluation of the consequences of material information. Further or alternatively, the Respondent failed to make inquiries which any reasonable authority in its position would have made.

(b) It is vitiated by substantial excisions which are *ultra vires* and/or amount to an unlawful failure to give reasons.

5. Ground 5: The Respondent failed properly to assess the remedy it would have imposed for the Vertical SLC in isolation and/or any option beyond the divestment of GIPHY. Given that the Respondent's theory for the Horizontal SLC is vitiated (see Grounds 1 to 4), there can be no reasonable basis to maintain the remedy set out in the Decision. Further or alternatively, the Respondent acted irrationally and/or disproportionately and/or procedurally unfairly by requiring the Applicant to divest itself of GIPHY as a remedy for the Vertical SLC.

6. Ground 6: In determining the remedy for the SLCs:

(a) The Respondent acted irrationally and/or disproportionately by requiring the Applicant to provide a specified minimum sum in cash to GIPHY.

(b) The Respondent acted *ultra vires* section 35(3) of the Act, alternatively irrationally and/or disproportionately, by requiring any purchaser of GIPHY to show a commitment to developing and providing GIF-based advertising in the UK.

(c) The Respondent acted *ultra vires* section 35(3) of the Act, alternatively irrationally and/or disproportionately, in requiring the Applicant to enter into an agreement with GIPHY for the supply of GIFs.

The Applicant seeks the following relief from the Tribunal:

1. An order pursuant to section 120(5)(a) of the Act quashing the Decision in its entirety or alternatively to the extent necessary to remedy the Respondent's errors of law.

2. An order that the Respondent pays the Applicant's costs of this Application.

3. Such further or other relief as the Tribunal deems fit.

Any person who considers that he has sufficient interest in the outcome of the proceedings may make a request for permission to intervene in the proceedings, in accordance with rule 16 of the Rules.

Please note that: (i) a direction of the President is currently in place as to the electronic filing of documents (see paragraph 2 of the Practice Direction relating to Covid-19 published on 20 March 2020); and (ii) any request for permission to intervene should be sent to the Registrar electronically, by email to registry@catribunal.org.uk, so that it is received within three weeks of the publication of this notice.

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at www.catribunal.org.uk. Alternatively, the Tribunal Registry can be contacted by telephone (020 7979 7979) or email (registry@catribunal.org.uk). Please quote the case number mentioned above in all communications.

Charles Dhanowa OBE, QC (Hon)
Registrar

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