



## COMPETITION APPEAL TRIBUNAL

### SUMMARY OF APPLICATION UNDER SECTION 120 OF THE ENTERPRISE ACT 2002

#### CASE No. 1366/4/12/20

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 26 August 2020 of an application for review under section 120 of the Enterprise Act 2002 (the “Act”) by Facebook, Inc. and Facebook UK Limited (together, “Facebook”) of the refusal by the Competition and Markets Authority (the “CMA”) to grant derogations from an initial enforcement order (“IEO”) made by the CMA on 9 June 2020 in connection with a merger between Facebook, Inc. and GIPHY, Inc (“GIPHY”). Facebook is represented by Latham & Watkins (London) LLP of 99 Bishopsgate, London EC2M 3XF (Reference: Jonathan Parker / David Little / Greg Bonné).

Facebook, Inc. is a corporation established under the laws of Delaware, USA, and is a publicly traded company listed on NASDAQ with its headquarters in California, USA. Facebook UK Limited is a company incorporated in England and Wales. Facebook offers a range of products and services including Facebook itself, Instagram, Messenger, WhatsApp, Oculus, Portal, Workplace and many others.

GIPHY operates a library of GIFs, GIF stickers and (since recently) videos with sound. GIPHY’s library of GIFs is provided to users directly through its website and app and indirectly through an API (Application Programming Interface) which enables users of third party apps – such as Snapchat, TikTok or Instagram – to access the library from those apps and to share from the library with other users of their apps.

According to the Application, Facebook, Inc. purchased GIPHY on 15 May 2020 and Facebook did not, and was not required to, make merger control filings in the UK or any other jurisdiction in respect of the acquisition. On 29 May 2020, the CMA wrote to Facebook stating that it was considering whether to open an investigation. Following further correspondence, Facebook provided the CMA with a confidential draft merger notice under section 96 of the Act, which set out the details of the transaction and the respective activities of Facebook and GIPHY. On 9 June 2020, the CMA made an IEO pursuant to section 72 of the Act against Facebook, Tabby Acquisition Sub, Inc.<sup>1</sup> and GIPHY, which was effective immediately.

Facebook states that the IEO is based on the CMA’s standard template available on its website, and the provisions contained in the template IEO imposed on Facebook and GIPHY include:

1. A general ‘catch-all’ prohibition on activities by Facebook and GIPHY that might prejudice a reference by the CMA or any remedial action, which includes (but is not limited to) action that might lead to the integration of the two businesses, or might otherwise impair the ability of the two businesses to compete independently.
2. Specific obligations that:
  - a) prohibit any substantive changes to the organisational structure of, or the management responsibilities within, the GIPHY or Facebook businesses except in “*the ordinary course of business*”;
  - b) require the parties to maintain the “*nature, description, range and quality of goods and/or services supplied in the UK*”;

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<sup>1</sup> Tabby Acquisition Sub, Inc. is a wholly-owned direct subsidiary of Facebook, Inc. which was used as the vehicle for acquiring GIPHY.

- c) require both parties to ensure that their assets are “*maintained and preserved*”, and prohibit them from disposing of or encumbering any of their assets;
  - d) prohibit Facebook and GIPHY from making any changes to their “*key staff*”; and
  - e) require that all reasonable steps are taken to “*encourage key staff to remain*” with Facebook and GIPHY.
3. A provision requiring that Facebook and GIPHY certify their compliance with the IEO on a fortnightly basis using a *pro forma* compliance certificate.
  4. A provision requiring the parties to notify the CMA of certain events, including details of key staff who leave or join the business, any “*substantial customer volumes won or lost or substantial changes to customer contracts*” and any substantial changes to GIPHY’s or Facebook’s “*contractual arrangements or relationships with key suppliers*”.
  5. A provision that the obligations in the IEO apply to all of Facebook’s subsidiaries active across the globe.

According to the Application, the CMA has appointed a Monitoring Trustee to oversee Facebook and GIPHY’s compliance with the IEO.

Facebook states that its legal advisers sent a list of urgent derogation requests to the CMA on 10 June 2020, which included ‘carve-out’ requests that certain provisions of the IEO would not apply to Facebook (the “Carve-Out Requests”).

According to the Application, the CMA has thus far refused to grant the Carve-Out Requests and has instead made requests for further information without addressing Facebook’s fundamental complaint that without derogations, the IEO is unreasonable in terms of the compliance burden that it places on Facebook and disproportionate in the scope of its application, with the CMA having failed to explain a necessary connection with the CMA’s objective of avoiding pre-emptive action.

In summary, Facebook challenges the CMA’s refusal to grant Facebook’s Carve-Out Requests on three grounds:

1. It is irrational and disregards the statutory purpose for which the CMA may order interim measures against a merger party.
2. It is disproportionate.
3. It breaches the legal certainty principle and creates impossible obligations.

Facebook seeks the following relief from the Tribunal:

1. An order quashing the CMA’s decision refusing consent to the Carve-Out Requests.
2. An order directing the CMA to grant Facebook the Carve-Out Requests. Alternatively, an order remitting the matter to the CMA to decide the Carve-Out Requests in accordance with the principles set out in the Tribunal’s judgment.
3. Costs.
4. 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)

pursuant to the Order of the Chairman of the Tribunal abridging time for applying for permission to intervene (made on 27 August 2020), any request for permission to intervene should be sent to the Registrar electronically, by email to [registry@catribunal.org.uk](mailto:registry@catribunal.org.uk), so that it is received **no later than 4pm on 4 September 2020**.

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

*Charles Dhanowa OBE, QC (Hon)*  
Registrar

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