



SUBMISSION TO THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION REGARDING THE FACEBOOK/GIPHY MERGER INQUIRY

March 2021

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SUBMISSION TO THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (ACCC) REGARDING THE FACEBOOK, INC / GIPHY, INC MERGER INQUIRY

1 March 2021

Introduction and Summary

This submission comprises Privacy International's ("PI") comments on Facebook, Inc's ("Facebook") completed acquisition of Giphy, Inc. ("Giphy") ("**acquisition**"), currently under review by the Australian Competition and Consumer Commission ("**ACCC**").¹

PI is an international charity, based in London, which campaigns against companies and governments who exploit individuals' data and technologies. PI employs specialists in their fields, including technologists and lawyers, to understand the impact of existing and emerging technology upon data exploitation and our right to privacy, including in relation to online platforms and the advertising technology ("**ad tech**") industry.

PI has an established track record of engaging with competition regulators around the world on issues that concern the intersection of data/privacy and competition laws.² PI has submitted evidence to the European Commission,³ the UK Competition and Markets Authority ("**CMA**"),⁴ and the U.S. Federal Trade Commission ("**FTC**") regarding data and competition issues.⁵ Most recently, PI intervened and made

¹ See ACCC, <https://www.accc.gov.au/speech/the-acccs-digital-platforms-inquiry-and-the-need-for-competition-consumer-protection-and-regulatory-responses>.

² PI, Competition and Data, <https://privacyinternational.org/learn/competition-and-data>.

³ PI, Privacy International's submission to the European Commission consultation on 'shaping competition policy in the era of digitisation', 2 October 2018, <https://privacyinternational.org/advocacy/2312/privacy-internationals-submission-european-commission-consultation-shaping>.

⁴ PI, Submission to the Competition and Markets Authority's call for information on digital mergers, 23 July 2019, <https://privacyinternational.org/node/3097>; Response to the CMA's online platforms and digital advertising market study, 29 July 2019, <https://privacyinternational.org/advocacy/3101/response-cmas-online-platforms-and-digital-advertising-market-study>.

⁵ PI, Submission to the US Federal Trade Commission on the intersection between privacy, big data, and competition, 1 August 2018, <https://privacyinternational.org/report/2262/submission-us-federal-trade-commission-intersection-between-privacy-big-data-and>.

submissions before both the European Commission's⁶ and the ACCC's⁷ review of Google LLC's acquisition of Fitbit, Inc., highlighting the series of competition concerns that the transaction raised with regard to the markets of digital advertising, wearables and health-related markets.

In the present submission, PI will argue that Giphy's acquisition by Facebook requires very close scrutiny by the ACCC. It is likely to significantly impede effective competition in several vitally important markets and result in the strengthening of Facebook's dominant positions, with ramifications for competition and in turn upon consumers and wider society. In particular, the acquisition would:

- further augment Facebook's dominance in the social media, messaging and digital advertising markets as Facebook could benefit from Giphy's data collection practices and integration with other services leading to a further lessening of competition in these markets;
- reduce what little pressure there currently is on Facebook to compete in relation to privacy options available to consumers, leading to even less competition on privacy standards and thereby enabling the further degradation of consumers' experience.⁸

This submission is structured in three parts. First, we will demonstrate why Facebook's access and use of consumer data ought to form part of the ACCC's competitive assessment of the completed acquisition. Second, we will demonstrate how Facebook could potentially use Giphy to further expand, and potentially abuse, its dominance in the social media and messaging, as well as digital advertising markets at the expense of consumers and competitors. Finally, we will draw some conclusions and seek to make some concrete recommendations in relation to remedies that might be able to alleviate some of these concerns.

⁶ PI, European Commission's review of the Google/Fitbit merger, <https://privacyinternational.org/legal-action/european-commissions-review-googlefitbit-merger>.

⁷ PI, Submission to the Australian Competition and Consumer Commission on the proposed acquisition of Fitbit, Inc. by Google LLC, 24 March 2020, https://privacyinternational.org/sites/default/files/2020-07/WEB_20.03.25_PI_Submission_Google_Fitbit_ACCC_FINAL.pdf; Response to the Australian Competition and Consumer Commission's Statement of Issues: Proposed acquisition of Fitbit, Inc. by Google LLC, 10 July 2020, https://privacyinternational.org/sites/default/files/2020-07/WEB_20.07.09_PI_Google_Fitbit_Response_ACCC_SOI_FINAL.pdf.

⁸ In a competitive market, it should be expected that the level of data protection offered to individuals would be subject to genuine competition, i.e. companies would compete to offer privacy-friendly services. In its 2014 assessment of the proposed merger of Facebook and WhatsApp, the European Commission acknowledged that "competition on privacy" exists. The European Commission stated that "apps compete for customers by attempting to offer the best communication experience," including with respect to "privacy and security, the importance of which varies from user to user but which are becoming increasingly valued, as shown by the introduction of consumer communications apps specifically addressing privacy and security issues". In addition, we note that the CMA's Online Platforms and Digital Advertising Market Study Final Report, published on 1 July 2020, explicitly refers to privacy as a parameter of competition, see (for example) paragraph 3.12 in relation to search and paragraph 3.158 in relation to social media.

I. The ACCC must examine Facebook's access to and use of consumer data as part of the competitive assessment of the completed acquisition

Individuals' data is the most important asset in the digital economy. The acquisition of vast quantities of data is what allows companies like Facebook to make billions of dollars each year via targeted advertising. As Facebook's 2020 annual report acknowledges:

We generate substantially all of our revenue from advertising. Our advertising revenue is generated by displaying ad products on Facebook, Instagram, Messenger, and third-party affiliated websites or mobile applications. Marketers pay for ad products either directly or through their relationships with advertising agencies or resellers, based on the number of impressions delivered or the number of actions, such as clicks, taken by users.⁹ (emphasis added)

The value of personal data increases as more and more data is combined, and this incentivises companies to pursue business strategies aimed at collecting as much data as possible.¹⁰ With the development and integration of artificial intelligence ("AI") technologies, users' data are even more important for these companies, since such data is an essential input to train AI models and serves as a defining factor for the accuracy and efficiency of these models.¹¹ As huge concentrations of power arising from the value of data in the digital economy already exist, it is of utmost importance that Facebook's data holding is central to the ACCC's competitive assessment of the completed transaction.

Indeed, the importance of data holding is very well-recognised by the tech giants, like Facebook, who consistently regard users' data as a business asset.¹² Data is also absolutely integral to these companies' business models and therefore their market value.¹³ We note as above that personal data is also an asset which is all the more

⁹ Facebook, Inc., Annual Report pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 (For the fiscal year ended December 31, 2020), 64, <https://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/4dd7fa7f-1a51-4ed9-b9df-7f42cc3321eb.pdf>.

¹⁰ Maurice Stucke and Allen Grunes, *Big Data and Competition Policy*, 2016 Oxford University Press.

¹¹ In case AT.39740 Google Shopping the European Commission considered barriers to entry and expansion in general search and noted the response of one company that underlined the importance of data and AI in this market: "obtaining the large quantity of data necessary to develop an effective [general] search engine (e.g., the information upon which relevancy algorithms can be built and improved) would be a significant barrier to entry" (recital 286).

¹² European Data Protection Supervisor (EDPS), Opinion 8/2016 on coherent enforcement of fundamental rights in the age of big data, 23 September 2016, https://edps.europa.eu/sites/edp/files/publication/16-09-23_bigdata_opinion_en.pdf.

¹³ As the CMA underlined in its Online Platforms and Digital Advertising Market Study Final Report, "[w]hile platforms provide services that are free to consumers when they use them, some also generate very large revenues - and are extremely profitable. Their business model relies on attracting consumers' attention and gathering data about them, which they use to sell personalised advertising." CMA, Online Platforms and Digital Advertising Market Study Final Report, 1 July 2020, para 4.2.

valuable when a digital service provider is able to combine data from multiple sources, including across multiple services or platforms.¹⁴

The ability to deal appropriately with concentrations of data is therefore key to evolving competition rules to deal with the challenges and realities of the digital economy. An assessment as to a company's data holding pre-and post-acquisition is highly relevant to the competitive effects of the acquisition: it is not solely a matter for data protection regulators. It must, therefore, be considered by competition regulators in any competitive assessment of mergers in this sector.

As the German competition regulator (Bundeskartellamt) noted in its February 2019 decision against Facebook:

Monitoring the data processing activities of dominant companies is therefore an essential task of a competition authority, which cannot be fulfilled by data protection officers. In cases of market dominance a competition authority must take into account data protection principles, in particular in the assessment of whether terms and conditions for the processing of data are appropriate.¹⁵

The German Federal Court of Justice (Bundesgerichtshof) upheld the Bundeskartellamt's findings in its judgment of 23 June 2020, contradicting the Düsseldorf Higher Regional Court's prior ruling. In its assessment of abuse, the Bundesgerichtshof found that Facebook abuses its dominant position by withholding options for users to limit the use of their data for personalisation of both Facebook content and advertisements on third-party websites that use Facebook's digital advertising tools. As such, privacy is explicitly recognised as a parameter of competition; effective competition in the social media network market would result in privacy safeguards for users, and it is within the remit of a competition authority to act in response to the anticompetitive and privacy-infringing conduct.¹⁶

PI therefore submits that it is absolutely vital that the ACCC consider the role and impact of data on competition when examining this acquisition. Were it to do so, in PI's view, the ACCC would conclude that the transaction will cause a significant impediment to effective competition.

¹⁴ We note that paragraphs 2.18 and 2.19 of the CMA Online Platforms and Digital Advertising Market Study Final Report detail the types of data which Facebook is able to combine to calculate consumer preferences and purchasing intent.

¹⁵ Bundeskartellamt, Bundeskartellamt prohibits Facebook from combining user data from different sources, Background information on the Bundeskartellamt's Facebook proceeding, 7 February 2019, https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook_FAQs.pdf.

¹⁶ Bundesgerichtshof, Bundesgerichtshof bestätigt vorläufig den Vorwurf der missbräuchlichen Ausnutzung einer marktbeherrschenden Stellung durch Facebook, 23 June 2020 <https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2020/2020080.html?nn=10690868>.

II. The impact of the proposed acquisition with regard to the social media, messaging and digital advertising markets

Giphy is a searchable database for Graphic Interchange Format ('GIF') files,¹⁷ stickers, emojis, text, videos and Arcade (remixable video games). This database can be queried through the Giphy search engine, either via its main website (giphy.com), its API¹⁸ or its SDK.¹⁹ Content obtained can then be shared via their URL or be integrated in another service such as a website or an app. Well known integrations of Giphy include messaging services like Whatsapp, Slack, Signal, Telegram, or popular social media platforms such as Twitter or Pinterest. Giphy also offers services for artists and content creators, including design tools, and allows them to promote and receive attribution for their creations.

The most common integrations of Giphy seem to be through its API and/or SDK. However, either of these integration methods can have a wide range of implications on what data can be accessed by Giphy, and what control the company using the service might have over the content delivery. In other words, the API gives developers a wide margin of liberty in the manner they choose to integrate Giphy in their apps and how to present content. It is essentially up to developers to define which GIFs will be presented to the users, under what format, circumstances, etc. This method allows privacy-oriented companies like Signal to integrate Giphy into their apps without sharing users' personal data. In opposition, Giphy's SDK is a mobile framework that integrates with apps at a deeper level and enables Giphy to access information about the end users. Through the SDK, the company offers additional services, such as analytics, and can implement changes or promote sponsored content without intervention from its clients, namely companies and individuals using Giphy's services through any of the methods described above. The SDK solution seems to be heavily promoted given its advantages.²⁰

Due to its intrinsically connected nature, Giphy has access to a number of data from the services it integrates with, as well as its users (depending on the method used). Common to all methods, the following data can be accessed:

- IP address of the service requesting content, which could be either the client's or the end user's address (e.g., the IP address of Signal's proxy server sending a request on behalf of its users);
- Metadata of the request (time, date, language, etc.);
- Search terms (e.g., "dancing", "pasta", "BLM", etc)

¹⁷ the Cambridge Dictionary defines GIF as: a type of computer file that contains a still or moving image. GIF is the abbreviation for "Graphic Interchange Format", <https://dictionary.cambridge.org/dictionary/english/gif>.

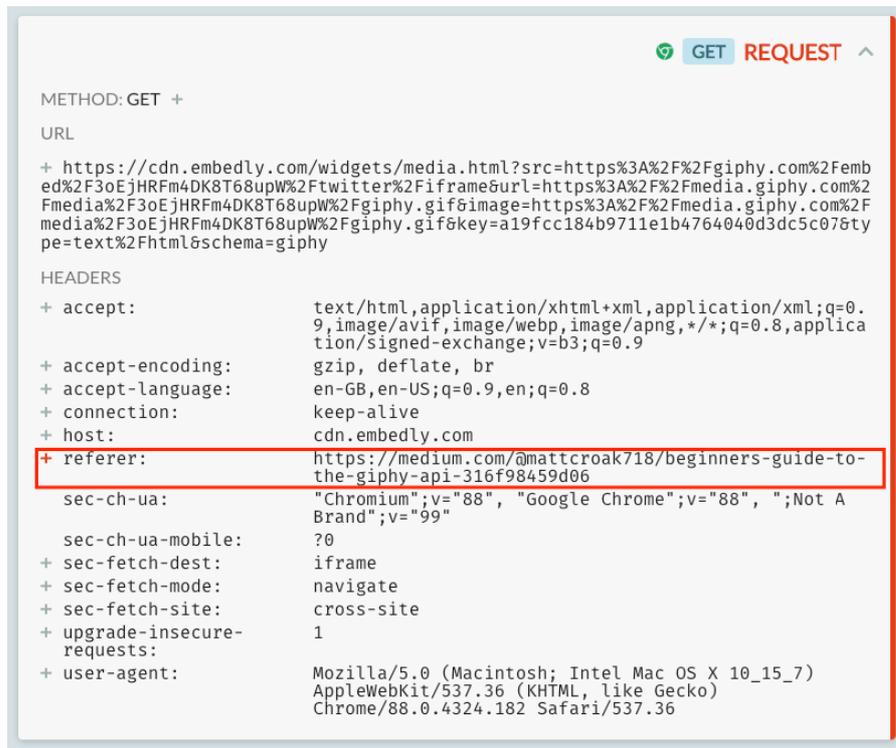
¹⁸ Application Programming Interface: an interface that defines and enables interactions between multiple software.

¹⁹ Software Development Kit: a packaged set of tools that facilitate the building or integration of certain functionalities in an app.

²⁰ <https://developers.giphy.com/>

In cases where the content is loaded from a website, additional data might be accessed:

- Coarse location of the user (inferred from the IP address);
- Device information (e.g., mobile/desktop, device manufacturer, browser, Operating System, etc.);
- Page being visited by the user where the content is requested (through the "referrer" parameter of a GET or POST request)

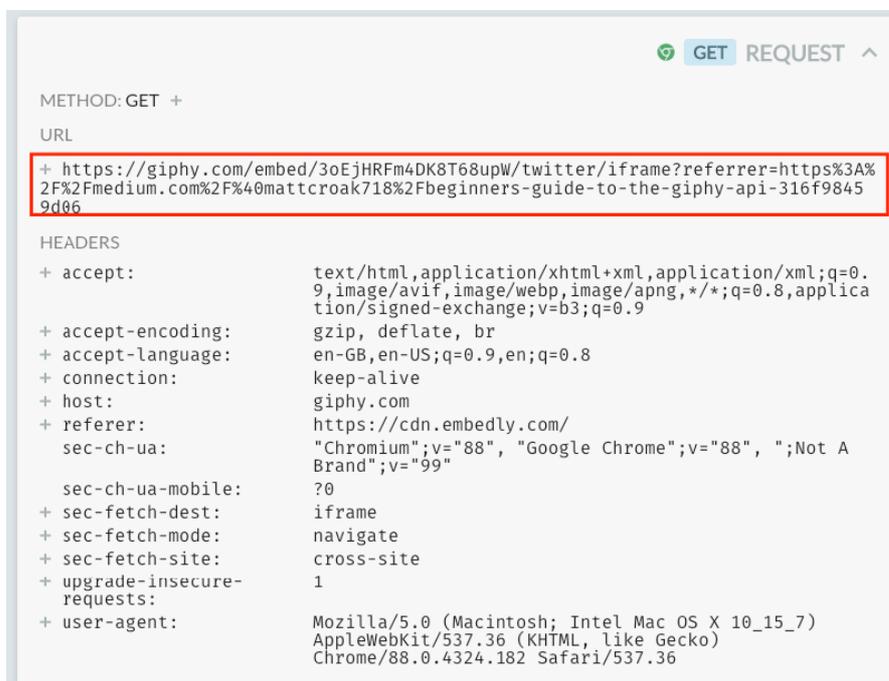


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GET REQUEST ^

METHOD: GET +
URL
+ https://cdn.embedly.com/widgets/media.html?src=https%3A%2F%2Fgiphy.com%2Fembed%2F3oEjHRFm4DK8T68upW%2Ftwitter%2Fiframe&url=https%3A%2F%2Fmedia.giphy.com%2Fmedia%2F3oEjHRFm4DK8T68upW%2Fgiphy.gif&image=https%3A%2F%2Fmedia.giphy.com%2Fmedia%2F3oEjHRFm4DK8T68upW%2Fgiphy.gif&key=a19fcc184b9711e1b4764040d3dc5c076type=text%2Fhtml&schema=giphy

HEADERS
+ accept: text/html,application/xhtml+xml,application/xml;q=0.9,image/avif,image/webp,image/apng,*/*;q=0.8,application/signed-exchange;v=b3;q=0.9
+ accept-encoding: gzip, deflate, br
+ accept-language: en-GB,en-US;q=0.9,en;q=0.8
+ connection: keep-alive
+ host: cdn.embedly.com
+ referer: https://medium.com/@mattcroak718/beginners-guide-to-the-giphy-api-316f98459d06
  sec-ch-ua: "Chromium";v="88", "Google Chrome";v="88", ";Not A Brand";v="99"
  sec-ch-ua-mobile: ?0
+ sec-fetch-dest: iframe
+ sec-fetch-mode: navigate
+ sec-fetch-site: cross-site
+ upgrade-insecure-requests: 1
+ user-agent: Mozilla/5.0 (Macintosh; Intel Mac OS X 10_15_7) AppleWebKit/537.36 (KHTML, like Gecko) Chrome/88.0.4324.182 Safari/537.36
```

Screenshot illustrating an example request to Giphy from a Medium blog post. The request goes through "embedly.com", an audience monitoring tool.



Screenshot illustrating a follow up request from “embedly.com” to Giphy. The URL requested includes the referrer, in this case the initial Medium blog post. This query returns the requested GIFs.

With regard to an application that uses Giphy's SDK, additional information may be accessed:

- Coarse location (inferred from the IP address)
- Device information (e.g: device manufacturer, OS...)
- Device identifier (e.g., Android Advertising ID)
- Application used (e.g., Snapchat if this app uses Giphy's SDK)

It should be further noted that device identifiers, such as Advertising IDs, can be used to cross reference data with other datasets. This could potentially enable Giphy to build profiles of their users. As PI has highlighted in its recent work on user's secret identities²¹ as well as in its complaints against some data brokers,²² personal data collected might be used to infer additional data through processing. For example, someone using the TikTok and Snapchat applications on a mobile device to search for GIF related with a slang term is likely to be inferred to be a young user.

²¹ PI, The companies in control of our secret identities, 28 January 2021, <https://privacyinternational.org/long-read/4398/companies-control-our-secret-identities>.

²² PI, Our complaints against Acxiom, Criteo, Equifax, Experian, Oracle, Quantcast, Tapad, 8 November 2018, <https://privacyinternational.org/advocacy/2426/our-complaints-against-acxiom-criteo-equifax-experian-oracle-quantcast-tapad>.

In its announcement of the acquisition of Giphy, Facebook stated that it "*plan[s] to further integrate their GIF library into Instagram and our other apps so that people can find just the right way to express themselves*".²³ This broad statement does not seem to provide any useful guidance with regard to how Facebook plans to use its new acquisition. However, there are a number of ways that Facebook could, as an advertising behemoth, potentially implement Giphy's services in ways that would allow it to expand (and potentially abuse) its existing dominance over the social media, messaging and digital advertising markets, by relying on its users' personal data. These ways could, among others, be as follows:

a) Extensive data collection practices

Users' data collected from websites or applications relying on Giphy's SDK is the main data that Facebook could potentially leverage to consolidate its market position. Online tracking is key to Facebook's business,²⁴ as it allows the company to profile users outside of its platform, enriching the already detailed profiles of users it might possess. This profiling seems to also rely on Facebook collecting information about individuals' browsing habits.²⁵ Knowing what websites people visit, their interests or shopping preferences helps Facebook improve its profiling and make its advertising products more attractive to advertisers.²⁶ It must also be noted that such profiling is done not only for Facebook users but reportedly for any internet user too.²⁷ who would, for instance, happen to visit a website with a Facebook service embedded (e.g., a tracking pixel, "Facebook Like Button", Facebook login etc.). In a report dated December 2018, PI revealed how Facebook routinely tracks users, non-users and logged-out users outside its platform through Facebook Business Tools.²⁸

Giphy's integration in services where Facebook has very little insights (such as a social media platform like Twitter or a rival messaging or social media app such as Snapchat) might offer just another way for the tech giant to collect personal data about users' habits in places where it previously had limited access.

²³ Facebook, Facebook Welcomes GIPHY as Part of Instagram Team, 15 May 2020, <https://about.fb.com/news/2020/05/welcome-giphy>.

²⁴ Andrew Griffin, Facebook admits it tracks people around the internet, watches what they look at, The Independent, 17 April 2018, <https://www.independent.co.uk/life-style/gadgets-and-tech/news/facebook-tracking-internet-safety-security-privacy-mark-zuckerberg-latest-a8308446.html>.

²⁵ See Facebook, Data Policy, Information from partners ("Advertisers, app developers and publishers can send us information through Facebook Business tools that they use, including our social plug-ins (such as the Like button), Facebook Login, our APIs and SDKs, or the Facebook pixel. These partners provide information about your activities off Facebook – including information about your device, websites you visit, purchases you make, the ads you see and how you use their services – whether or not you have a Facebook account or are logged in to Facebook"), <https://en-gb.facebook.com/policy.php>.

²⁶ Facebook, Ad targeting: Ad targeting, Help your ads find the people who will love your business, <https://en-gb.facebook.com/business/ads/ad-targeting>.

²⁷ Alex Hern, Facebook admits tracking users and non-users off-site, The Guardian, 17 April 2018, <https://www.theguardian.com/technology/2018/apr/17/facebook-admits-tracking-users-and-non-users-off-site>.

²⁸ PI, How Apps on Android Share Data with Facebook (even if you don't have a Facebook account), December 2018, <https://privacyinternational.org/sites/default/files/2018-12/How%20Apps%20on%20Android%20Share%20Data%20with%20Facebook%20-%20Privacy%20International%202018.pdf>.

b) Emotion recognition and trend detection

Core to Giphy's services is the use of keywords to express emotions. In the past, Facebook has been reported to have claimed to be able to identify emotions or psychological insights of its users for advertising-related purposes.²⁹

Even without access to users' personal data, access to Giphy's daily search queries could potentially allow Facebook to make use of this data for marketing purposes, giving it valuable insights into trends and how people feel. Coupled with the monitoring of usage of competitors' apps, this could also put Facebook in an advantageous position where it could analyse how users of a certain service feel on a certain day, creating yet again opportunities for targeted marketing (potentially of its own rival service when users are unhappy).

Facebook's access to Giphy's data and services opens the door to a potentially wide range of abuse that would be harmful to both consumers and competitors. We focus on the following harms:

c) Limiting access to Giphy's services

Facebook could leverage its acquisition of Giphy to gain a competitive advantage by limiting access to Giphy's services. This can be done in a few different ways with different implications, some with a potentially significant risk of exploitation of users' personal data:

- Facebook may seek to prevent Giphy's clients, namely competitor platforms, apps etc, from using its API or SDK. By preventing existing or future clients from integrating Giphy, Facebook would put itself in a position where only its own product can make use of the popular GIFs service, rendering its product more attractive. This would also impact competitors by restricting the features they are able to offer to their respective users.
- Facebook may make use of Giphy's Terms of Services to refuse access to its API or SDK to certain competitors. Similar to what the company did with Vine by preventing the app from using its "Search Friends" feature, Facebook could swamp nascent competition by preventing them from integrating Giphy into their service.³⁰
- Facebook may impose new technical limitations on Giphy's services (e.g., restrictions on maximum number of queries). This would effectively prevent clients with important user bases from using Giphy freely.
- Facebook may transform Giphy into a paid service, making access to its API and SDK available only for a fee. This solution would harm Facebook competitors, forcing them to pay to keep offering the feature to their users.

²⁹ Sam Levin, Facebook told advertisers it can identify teens feeling 'insecure' and 'worthless', The Guardian, 1 May 2017, <https://www.theguardian.com/technology/2017/may/01/facebook-advertising-data-insecure-teens>.

³⁰ Fiona M. Scott Morton and David C. Dinielli, Roadmap for an Antitrust Case Against Facebook, Omidyar Network, June 2020, 24, <https://www.omidyar.com/wp-content/uploads/2020/06/Roadmap-for-an-Antitrust-Case-Against-Facebook.pdf>.

- Facebook may remove Giphy's API. This scenario would allow Facebook to enforce usage of the SDK for mobile app, allowing the company to access detailed users' data from their competitors.
- Facebook may impose changes to the API, forcing Giphy's clients to provide more information, likely users' data. Such change would allow Facebook to use Giphy to enrich its own dataset with a similar level of data to what the SDK or web integration offer.

d) Degrading users' experience

Having control over the content requested by Giphy's clients (i.e., API or SDK users), Facebook would be in a position to decide what results Giphy's search engine returns and how. As such, Facebook could degrade the experience by inserting ads and sponsored content in the results returned to Giphy's clients. This behaviour could also be selected to apply only for API users, thereby pushing developers to use SDK rather than API, leading to an increase in users' data collection.

e) Extension of Facebook advertising into search engine market

Giphy primarily functions as a search engine where users request GIFs through a search term. In an event dated February 2019, the company announced that it was exploring an advertising scheme to embed advertising in private messages,³¹ meaning a user could be shown an ad when searching for a GIF.

Facebook currently offers search advertising on its platform, allowing advertisers to show ads on certain search terms. This is however limited to Facebook users and does not have a reach comparable to other search engines like Google. With the acquisition of Giphy, Facebook is extending the potential for its advertising tool as the company could be able to offer advertising across services, possibly within the ecosystem of competitors. This would mean for example that a Slack user searching for a GIF might be presented with ads related to the term they searched without Slack generating any revenue on this ad.

Potential negative impact on markets and consumers

Any of the aforementioned ways Facebook could potentially build on its acquisition of Giphy, would lead to a situation where developers using Giphy's service would either have restricted or no access to a product that is integrated into their service. We understand that Giphy seems to be currently the dominant solution on the market for GIF images and has a heavy focus on content creation. Preventing access to Giphy for any service would force this service to look for alternatives. PI understands that Tenor is currently the main competitor to Giphy, although its products are slightly different. Tenor has been acquired by Google in 2018.³² This means that, in the future,

³¹ Kelsey Sutton, [Giphy Wants Brands to Advertise in Private Messages](https://www.adweek.com/digital/giphy-wants-brands-to-advertise-in-private-messages), AdWeek, 12 February 2019, <https://www.adweek.com/digital/giphy-wants-brands-to-advertise-in-private-messages>.

³² Tenor, Google acquires Tenor, 27 March 2018, <https://blog.tenor.com/google-acquires-tenor-77fdclbe737c?gi=f0edeecdd582>.

application developers might have to essentially choose between Google and Facebook, the two advertising giants. This is particularly problematic given that advertising is the dominant business model for a number of online services, such as new social media or apps, making them direct competitors to the services they might want to implement.

From a consumer perspective, the acquisition of Giphy by Facebook might induce a number of harmful changes. First, in terms of extensive data collection practices that the acquisition might enable Facebook to conduct, users would be more likely to be tracked and profiled by Facebook on the internet. Facebook's presence over the internet means that the number of sites and services which do not integrate at least one of its services is limited. In its Digital Platform Services Inquiry report on 23 October 2020, the ACCC established that FB has trackers on 40% of the top 1000 applications³³. With the added tracking potential of Giphy, Facebook will be in an even stronger position to track and profile any internet user. There has reportedly been a number of complaints against Facebook's practices³⁴ and the company has been fined for the data collection it operates outside the platform.³⁵ We have already noted our concerns with regard to FB's tracking of consumers across the internet above. While ways to restrict Facebook tracking do exist, they do not always seem to be user-friendly.³⁶ The acquisition of Giphy would potentially give Facebook another way to track users, who might find it difficult to use Giphy without providing personal data to Facebook.

In a situation where Facebook was to restrict access to Giphy, users wanting to use this service might be forced to migrate to products approved by Facebook. Whether this means using an app owned by Facebook or one that uses Giphy's SDK, users' personal data would be likely to be harvested by the advertising giant. Forcing users to sacrifice part of their privacy to continue enjoying a service should be viewed as a harmful practice and could inevitably result in lowering privacy standards online.

³³ ACCC, Digital platform services inquiry - interim report, 23 October 2020, <https://www.accc.gov.au/publications/serial-publications/digital-platform-services-inquiry-2020-2025/digital-platform-services-inquiry-september-2020-interim-report>.

³⁴ See, for example, Carole Cadwalladr and Emma Graham-Harrison, Facebook accused of conducting mass surveillance through its apps, The Guardian, 24 May 2018, <https://www.theguardian.com/technology/2018/may/24/facebook-accused-of-conducting-mass-surveillance-through-its-apps>.

³⁵ Natasha Lomas, Facebook's tracking of non-users ruled illegal again, 19 February 2018, <https://techcrunch.com/2018/02/19/facebooks-tracking-of-non-users-ruled-illegal-again/?guccounter=1>.

³⁶ PI, No, Facebook is not telling you everything, 24 February 2020, <https://privacyinternational.org/long-read/3372/no-facebook-not-telling-you-everything>.

III. Conclusion

To sum up PI's concerns, through the acquisition of Giphy, Facebook would potentially be able to:

- Obtain users' personal data processed via Giphy and potentially combine it with the vast amount of data it already process to further strengthen its capacity to profile users, predict and influence their behaviours;
- By modifying Giphy's API, increase the categories of personal data collected from users;
- Impose to clients (including Facebook's competitors in the social media and messaging market) conditions for the use of Giphy, potentially preventing clients from protecting their users' personal data;
- Increase its capacity to deliver targeted ads both to Giphy's users and internet users even outside Facebook's platform and services (and including within the ecosystems of its competitors) through increase tracking capabilities.

Short of preventing the acquisition, the ACCC should consider effective remedies to mitigate these risks. These should include obtaining binding and specific commitments from Facebook to:

- a) refrain from combining personal data from Giphy with other personal data processed by Facebook or with personal data from other third-party services, and from requiring Giphy's users to sign in with other services of Facebook;
- b) Continue to licence free APIs offering at least the functionalities of APIs as they currently exist without additional restrictions or changes to Terms of Services limiting or preventing their use by external services;
- c) refrain from merging Facebook's advertising services with any advertising services Giphy might develop, and refrain from processing personal data from Giphy to improve its own advertising services;
- d) Refrain from processing any data from Giphy's search engine for any purpose other than delivering content related to search queries (e.g.: emotion recognition, high level analytics of users feelings etc.)

PI believes that these commitments could prevent some of the risks identified in this submission. However, we remain concerned by the track record of Facebook and its failure to comply with commitments made before competition regulators in the past.³⁷ For this reason, we believe that any imposed remedies should be actively monitored and enforced by the ACCC.

³⁷ In May 2017, the European Commission fined Facebook \$122 million for providing incorrect or misleading information during its 2014 acquisition of WhatsApp. At the time of the acquisition, Facebook assured the European Commission that it would not be able to link its accounts database to that of WhatsApp. After the merger,

