IN THE COMPETITION APPEAL TRIBUNAL **Case No: 1429/4/12/21**

BETWEEN:

META PLATFORMS, INC.

Applicant

- and -

THE COMPETITION AND MARKETS AUTHORITY

Respondent

-supported by-

PRIVACY INTERNATIONAL

Intervener

STATEMENT OF INTERVENTION
PRIVACY INTERNATIONAL

INTRODUCTION

1. This Statement of Intervention is submitted on behalf of Privacy International ("**PI**") pursuant to §2 of the Tribunal's order of 15 February 2022. PI supports the Defence of the Competition and Markets Authority (the "**CMA**").

2. In its application for judicial review under section 120 of the Enterprise Act 2002 (the "**Application**"), Meta challenges the CMA's decision contained in a report dated 30 November 2021 and published pursuant to section 38 of the Enterprise Act 2002 (the

"**Decision**"). In the Decision, the CMA found that the completed merger between Meta and GIPHY, Inc. ("**GIPHY**") (the "**Merger**") has resulted, or may be expected to result, in a substantial lessening of competition ("**SLC**"); and required Meta to divest GIPHY in full to a suitable purchaser in order to remedy the SLC.

3. Meta brings its challenge under five grounds of review. Ground 1 challenges the CMA's finding that the Merger will result in a Horizontal SLC. Ground 2 challenges the CMA's definition of the relevant market on which it alleges Meta competes and the CMA's finding of market power on the part of GIPHY. Ground 3 challenges the CMA's findings in relation to the counterfactual. Ground 4 challenges the Decision on grounds of procedural fairness. Ground 5 challenges the divestment remedy set out in the Decision. Ground 6 challenges other aspects of the remedy for the SLCs.

4. PI is a leading non-profit, non-governmental organisation in the data rights and data privacy sphere. PI employs a range of specialists – technologists, researchers, policy experts and lawyers – who investigate how people's personal data is generated and exploited, and develop methods of protecting data rights and privacy through legal and technological frameworks.

5. PI supports the CMA's Defence to the Application. PI participated in Phase 1 of the CMA's review of the Merger. At that stage, PI urged the CMA to closely examine Meta's access to and use of consumer data as part of its competitive assessment of the Merger. PI provided information on the range of data which GIPHY had access to and submitted that: (i) the Merger would strengthen Meta's dominance in the social media, messaging and digital advertising market as a result of Meta's ability to benefit from GIPHY's data collection practices and integration with other services; (ii) the Merger would reduce what little pressure Meta currently faced to compete on privacy standards for consumers; and (iii) there was a risk that Meta might foreclose access to GIPHY's services by making access conditional on the provision of data about users or aggregate trends to Meta.[1]

6. In these submissions, PI now focuses, in particular, on Ground 5 of the Application.

[1] See: https://privacyinternational.org/sites/default/files/2021-03/PI%27s%20Submission%20to%20the%20UK%20Competition%20and%20Markets%20Authority_0.pdf

7. In the Decision, the CMA concluded that the Merger would result in a Vertical SLC in the supply of social media services as a result of input foreclosure. The input foreclosure theory of harm is that the Merger may lead to Meta foreclosing access to GIPHY's services to rival social media platforms in order to harm their current and future ability to compete in social media and display advertising. Meta could do so by: (i) ceasing to supply GIPHY's GIFs via GIPHY's API/SDK integration (total foreclosure); (ii) worsening the terms of GIPHY's current GIF supply to rivals; (iii) reprioritising innovation and development of GIPHY's API/SDK services towards the requirements of Meta's own social media services; (iv) requiring rivals to provide data as a condition for access to GIPHY, i.e. data foreclosure[2] ((ii) to (iv) amounting to partial foreclosure). The CMA found that Meta would have both the ability and incentive to foreclose its social media rivals in these ways.[3]

8. Meta does not challenge the CMA's findings on the Vertical SLC or the CMA's finding that Meta would have the ability and incentive to foreclose its rivals through either total, partial or data foreclosure. However, it challenges the remedy for the Vertical SLC on the basis, *inter alia*, that a divestiture order (the "**Divestiture Remedy**") is a disproportionate remedy for the Vertical SLC alone.

9. In these submissions, PI supports the CMA's conclusion that the Divestiture Remedy is a necessary and proportionate remedy for the Vertical SLC. Its submissions are structured as follows:

   (a) First, PI briefly explains how GIPHY is integrated into other applications and platforms, and the effect this has on GIPHY's ability to collect user data, as factual context for points made later in the submissions;

   (b) Second, PI provides further explanation of Meta's ability and incentive to use data foreclosure as a tool for disadvantaging its rivals;

[2] The data foreclosure mechanism refers to Meta's ability to use GIPHY's data to disadvantage its rivals in social media (not to Meta's ability to improve its offering by using GIPHY's data). The ways in which Meta could use GIPHY's data to place its rivals at a competitive disadvantage are set out in §8.102 of the Decision.

[3] See: Decision at §§8.2, 8.8.

(c) Third, PI explains the significant harms that could result to consumers as a result of Meta's data foreclosure of its rivals; and

(d) Fourth, PI explains why the remedies proposed by Meta are insufficient to address the Vertical SLC.

How GIPHY is integrated into applications

10. According to GIPHY's Privacy Policy, GIPHY may collect personal data which users *"have made available to"* third parties, should they use a third party service to access GIPHY (which would almost always be the case). GIPHY might also collect personal data such as *"browser or online activity"*, *"IP address, language preferences, timestamp"* and user identifiers.[4] This data would allow GIPHY to infer a user's preferences (potentially including sensitive personal data). For example, if someone visits an online article called "Tips on gay dating" which happens to have a GIF image embedded into it, the data sent to GIPHY will not only include their device characteristics or their IP address, but also information about the GIF their browser has loaded and the title of the article it was embedded into.

11. However, the type and extent of data which can be accessed by GIPHY will depend on the method of integration used. The most common integrations of GIPHY are through its Application Programming Interface ("**API**") and its Software Development Kit ("**SDK**"). An API is an interface that defines and enables interactions between multiple software. An SDK is a packaged set of tools that facilitates the building or integration of certain functionalities in an app. Fundamentally, APIs enable developers to integrate GIPHY in a more privacy-protective manner:

(a) An API gives developers greater choice over the manner in which they choose to integrate GIPHY in their apps and how to present content. Using an API integration allows privacy-oriented companies like Signal to integrate GIPHY into their apps without sharing users' personal data.

(b) By contrast, GIPHY's SDK is a mobile framework that integrates with apps at a deeper level and enables GIPHY to access information about end users. Through

[4] See: GIPHY Privacy Policy – GIPHY

the SDK, GIPHY offers additional services, such as analytics, and can implement changes or promote sponsored content without intervention from its clients.

(c) The IP address of the service requesting contact, the metadata of the request (time, date, language etc.) and the search term used can be accessed by GIPHY regardless of whether it is integrated into a client's application using an API or GIPHY's SDK. However, developers can use GIPHY's API through a relay so as to hide users' personal data / user identifiers. Furthermore, the following additional information can be accessed by GIPHY if an app uses GIPHY's SDK: coarse location (derived from the IP address), device information, device identifier and the application used.

Data foreclosure

Mechanism of data foreclosure

12. The data foreclosure mechanism is explained by the CMA in the Decision at §8.92: the Merger would allow Meta to disadvantage its rivals *"by using its provision of GIPHY's services to rival platforms as a means of acquiring data on user behaviour or wider trends on these platforms, thereby further weakening competitors' ability to compete in social media and digital advertising and further raising barriers to entry (due to the differential in access to data). [Meta] could, in principle, require apps to return more data to GIPHY as a condition of supply, or otherwise require that the apps do not stop supplying or hide the data already being provided to GIPHY via their integrations pre-Merger."* The CMA also noted at §8.10 that: *"[Meta] could require larger partners, that currently do not return user-level identifiers to GIPHY, to request such data as a condition of supply"*.

13. PI notes that, in line with the CMA's findings in the Decision, Meta could take the following steps to achieve data foreclosure:

(a) Meta could remove GIPHY's API. This would allow Meta to enforce use of the SDK for mobile apps, allowing the company to access detailed users' data from its competitors. From PI's research, it is evident that app developers share data with Meta through Meta's SDK. PI understands that, although the developer can utilise a number of controls to limit the 'default' data it sends to Meta, if the SDK is

integrated without configuration, its default action as of 2018 was to send data to Meta.[5]

(b) Meta could impose changes to the API, forcing GIPHY's clients to provide more information such as users' data. These changes would allow Meta to use GIPHY to enrich its own dataset with a similar level of data to that which the SDK offers.

(c) By controlling the content provided by GIPHY to its clients (whether API or SDK users), Meta would be in a position to decide what results GIPHY's search engine returns and how these results are returned. As such, Meta could degrade the user experience by inserting ads and sponsored content in the results returned to GIPHY's clients. Moreover, this behaviour could be selected to apply only to API users, which would 'push' developers to use the SDK rather than the API, leading to an increase in users' data collection.

Meta's incentive to use data foreclosure to disadvantage its rivals

14. The CMA also found that Meta had the incentive to foreclose rivals from GIPHY. At §8.130, the Decision explains the strategic benefit of foreclosure to Meta, which is that by harming rival social media platforms' ability to innovate, grow and develop, Meta could prevent or slow down the emergence of competitive threats and further strengthen its significant market power in social media. At §8.100, the Decision explains the value to Meta of both GIPHY's user level data and the aggregate data on usage of competitor apps. The Decision found that use of GIPHY's data could allow Meta to harm rival social media platforms in two ways:

(a) First, Meta could use GIPHY's data to improve its ability to identify and react to emerging trends on rival apps and / or identify emerging competitive threats before they become material:

[5] In 2018, PI analysed the data that 34 apps on Android, each with an install base from 10 to 500 million, transmitted to Facebook through Facebook's SDK (*How Apps on Android Share Data with Facebook - Report*: https://privacyinternational.org/report/2647/how-apps-android-share-data-facebook-report. All apps were tested between August and December 2018, with the last re-test happening between 3 and 11 of December 2018. The full documentation, including the exact date each app was tested, can be found at https://privacyinternational.org/appdata). PI's research found that apps that automatically transmit data share this data with Facebook together with a unique identifier, the Google advertising ID.

(i) As GIPHY is able to track the number of requests it receives per app, GIPHY's aggregate data can help Meta react to competitive threats by providing Meta with information about the level of usage of competitors' apps.

(ii) Meta could, for example, look at all the requests coming from TikTok through GIPHY to get a sense of how many users are using the app at a given time. This data would allow Meta to not only understand the usage rates of GIPHY across different apps, but also to predict the usage rates of the apps making use of GIPHY themselves.

(iii) In this way, Meta could monitor emerging platforms which make use of GIPHY and identify competitive threats early on.

(iv) Without comparable data on competitor activity, Meta's rivals in social media services would be disadvantaged in their ability to compete against Meta. This would result in Meta's own innovation efforts being limited to areas of perceived competitive threats.[6]

(b) Second, the quality of rival social media platforms' services may suffer immediately from the perspective of users who value privacy (i.e. users of platforms may be unwilling to continue using it if they become aware that data is being shared with third parties). As the Decision notes at §8.102(b), Meta's requirement to share data through GIPHY would therefore be equivalent to raising the price of GIPHY's services to third parties, who would either have to stop using a GIF facility altogether or switch to another provider (of which there is a lack of effective alternatives).

15. Indeed, since the announcement of the Merger a number of Meta's competitors have implemented changes that illustrate the risk they perceived of Meta obtaining access to data through GIPHY. Twitter, which used to rely on GIPHY to provide GIFs to its users (as shown on GIPHY's own developers' documentation)[7] has now switched to using Tenor for this feature. Similarly, popular messaging app Telegram (which published a

[6] Decision at §§8.98-8.105, §§8.141-8.143 and §8.153.
[7] See: https://support.giphy.com/hc/en-us/articles/360020072272-How-to-Share-a-GIF-on-Twitter.

public response on Twitter at the time of the Merger to address privacy concerns[8]) has since switched to Tenor to provide users with GIFs owing to privacy concerns over Meta tracking people's usage behaviour through GIFs shared on the platform.[9] These examples illustrate how companies are attempting to keep Meta out of their own ecosystems for competition reasons (e.g. preventing Meta from obtaining insight into their app usage) and / or privacy reasons (e.g. Telegram is a privacy-oriented messaging app which directly competes with Facebook Messenger and uses privacy as a selling point).

16. The fact that both companies chose to switch to Tenor, which is owned by Google, indicates the limited competition in GIF providers. Following the Merger, application developers will have to choose between Google and Meta, the two advertising giants. [10] In this regard, the CMA identified in the Decision that GIFs, as drivers of user engagement, are important to social media platforms' ability to fund their business through display advertising in competition with Meta. Accordingly, there are linkages between the social media and display advertising markets such that the harm to the competitiveness of social media platforms in the supply of social media services (the vertical foreclosure which is the subject of this Statement of Intervention) may translate into a weakening of competition between social media platforms in the market for display advertising – potentially reinforcing Meta's incentive for input foreclosure.

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[8] See Jay Peters, *Facebook's Giphy acquisition might have big implications for iMessage and Twitter*, The Verge, 16 May 2020: https://www.theverge.com/2020/5/16/21260104/facebook-giphy-acquisition-twitter-slack-snapchat-apple-imessage-signal-facebook-tinder. The author commented, "*It's also important to note that there are no tracking pixels, cookies, or any other embedded user tracking mechanisms in Giphy's GIFs or stickers, [Facebook] tells The Verge. And the Giphy API can see your search terms, but not any of your data, according to the Twitter account for the messaging service Telegram. Giphy confirmed to The Verge that Telegram's tweet is accurate. But there's always the chance Facebook could change the way Giphy works down the line. And apps and services that use Giphy now could drop support for the service at any moment, regardless of what Facebook decides to do with the service.*" [emphasis added]

[9] See:https://telegram.quora.com/Telegram-changed-their-gif-provider-to-tenor-after-Giphy-being_acquired-by-Facebook

[10] See further Decision, §8.28-8.29 where the CMA noted that the availability of Tenor does not preclude an SLC based on foreclosure. In fact, the CMA considered that the availability of only one, rather than a range of effective alternatives, increases the likelihood that any attempt at foreclosure would lessen the competitive constraint on the only remaining effective alternative, reducing its incentive to compete, including in respect of data. PI notes for completeness that the position of Tenor was also considered by the CMA in the context of the assessment of dynamic competition for the purposes of the Horizontal SLC in the display advertising market. In that context, the CMA's view as set out at Decision §7.42(c) was that, following the Merger, no other potential competitor (including Tenor) is playing, or is likely to play, a similarly important role in the dynamic competitive process as GIPHY would have done absent the Merger.

Consumer harm caused by Meta's use of GIPHY's data

17. The use of GIPHY's data to partially foreclose rival social media platforms would cause consumers harm in two ways:

    (a) First, by the mechanisms of data foreclosure summarised above, Meta would be able to collect large amounts of personal data from users of apps which integrate GIPHY. There is therefore a direct and significant risk of Meta exploiting users' personal data, causing harm to consumers.

    (b) Second, if Meta forecloses rival social media platforms, including by reducing the data privacy available to consumers who use rival platforms, this would have the effect of reducing privacy standards across social media platforms, which, in turn, limits an important parameter of competition. This would cause harm to consumers over the longer term, as social media platforms have less incentive, or ability, to compete on privacy.

    (c) In relation to this point, PI notes that in a competitive market, the level of data protection offered to individuals should be subject to genuine competition, i.e. companies should compete to offer privacy-friendly services. In its 2014 assessment of the proposed merger of Facebook and WhatsApp, the European Commission (the "**Commission**") acknowledged that "*competition on privacy*" exists. The 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"*.[11] In addition, PI notes that the CMA's Online Platforms and Digital Advertising Market Study Final Report, published on 1 July 2020 (the "**Digital Markets Study**"), explicitly refers

[11] See: Commission Decision in Case No COMP/M.7217 - FACEBOOK/ WHATSAPP, Recital 87, available at: https://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf

to privacy as a parameter of competition, see (for example) §3.12 in relation to search and §3.158 in relation to social media.[12]

Assessment of the remedies proposed by Meta to tackle the Vertical SLC

18. The remedy options proposed by Meta, and particularly the "Open Access Remedy", are not adequate substitutes for the Divestiture Remedy. In particular, none of the proposed remedies effectively address the concerns arising from the Vertical SLC relating to the ways in which Meta may seek to use GIPHY's data to partially foreclose its rivals.

19. Under the Open Access Remedy, Meta proposed that for a period of five years, it would undertake:

    (a) To maintain access to GIPHY's library for new and existing API users under the same terms and conditions as was the case pre-Merger ("**Open Access Undertaking**");

    (b) To ensure that access to GIPHY's API would not be conditional upon sharing user-specific information with Meta and that GIPHY's API users would remain free to use proxy servers or cache GIPHY traffic as they are permitted to do today (the "**No Conditional Access Undertaking**");

    (c) Not to use, without the consent of API users, any individually identifiable user-level or aggregate data obtained through the GIPHY API for Meta's advertising business in the UK (the "**No Ads Usage Undertaking**").

20. Pursuant to the CMA's Merger Remedies Guidelines, the assessment of the effectiveness of a remedy involves *"several distinct dimensions"* (§3.5). This includes the need to address any SLC throughout the entirety of its expected duration (appropriate duration and timing), whether the remedy can be monitored, implemented and enforced

[12]See:https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf

effectively (practicality), as well as the degree of certainty of achieving the desired effect (acceptable risk profile). [13]

21. Meta's proposed Open Access Remedy fails to effectively satisfy these requirements.

The Open Access Remedy does not address the issue of SDK's or other tracking technologies

22. An obvious shortcoming of the Open Access Remedy is that it does not address the issue of SDKs or other tracking technologies.

23. Meta's business model largely relies on the acquisition and processing of vast amounts of users' personal data, which enables it to generate profit through advertising. Meta's capability to track individuals online, especially those who do not have a Facebook account or are not Facebook users, is often achieved through the integration of various tracking technologies into other online services.

24. SDKs, as described above, are tools used within the development of various mobile phone applications. While they are not tracking technologies per se, they do allow for the transfer of personal data to the company that developed them (in this instance GIPHY and Meta). The implementation of the GIPHY SDK by GIPHY's clients would allow Meta to collect personal data from sources which it does not currently have access to. This personal data could be combined with datasets which Meta already possesses about users and provide greater insights into their preferences.

25. By focusing only on Meta's ability to obtain user data from clients who use the GIPHY API (as opposed to the SDK), the Open Access and No Conditional Access Undertakings only partially address the concerns about data foreclosure which form part of the Vertical SLC. As explained at §13(c) above, Meta could also degrade the user experience for API users in order to 'push' developers to use the SDK integration rather than the API. This would be another mechanism of data foreclosure and is not addressed by the Open Access Remedy.

[13] See: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/764372/Merger_remedies_guidance.pdf

26. Moreover, as set out at §17(a) above, GIPHY's SDK raises heightened privacy concerns, as it potentially provides Meta with access to a broader set of personal data. It is thus concerning that Meta would not offer to apply the No Ads Usage Undertaking to the SDK.

Duration of proposed remedy is inadequate to address the Vertical SLC

27. The fact that the Vertical SLC could persist beyond five years,[14] and hence that any time-limited remedy would present *"a significant inherent weakness… whether considered individually or in combination"*,[15] was central to the CMA's decision that divestiture was necessary, as opposed to a behavioural remedy.

28. PI supports this finding; it notes that a time limited remedy would not address adequately the concerns around data foreclosure underpinning the Vertical SLC. This is because during the five-year period, Meta could nonetheless use GIPHY as a vehicle to collect certain categories of personal data that would be useful to Meta in the longer term:

    (a) Throughout the five-year period, the categories of personal data and the extent of GIPHY's data collection would still be managed by Meta, which would be able to set the exact categories and extent of user tracking which GIPHY performs.

    (b) Some of this data might still be retained by GIPHY at the end of the 5-year period, especially if GIPHY was required to retain this data in order to adhere to regulatory requirements imposing the mandatory retention of users' personal data for legal, tax compliance, security, audit or other purposes.[16] GIPHY's Privacy Policy also acknowledges that such a data transfer or merge could occur as a result of a business acquisition, in absence of users' explicit and informed consent.[17]

[14] Decision, §11.244(b).
[15] Decision, §11.258.
[16] Both EU and UK data protection laws allow for the processing of personal data for purposes related to the defence of legal claims, compliance with legal obligations as well as defending the legitimate interests of data controllers. According to GIPHY's Privacy Policy, users' personal data can be retained for longer periods *"if doing so is necessary to comply with our legal obligations, resolve disputes or collect fees owed, or is otherwise permitted or required by applicable law, rule or regulation".*
[17] GIPHY's Privacy Policy states as follows: "*In some cases, we may choose to buy or sell assets. In these types of transactions, user information is typically one of the transferred business assets. Moreover, if we, or substantially all of our assets, were acquired, or if we go out of business or enter bankruptcy, user information*

Therefore, even if Meta implemented a 'data silo' for five years, whereby it did not access any personal data held by GIPHY, there would be nothing preventing Meta from merging the personal data held by GIPHY with its own datasets at the end of the five-year period. The quantity and quality of personal data held by GIPHY would likely be similar or greater at the end of the five-year period than at the time of the Merger.

(c) At that point, Meta could make use, without the consent of GIPHY's API users, of individually identifiable user-level or aggregate data obtained through GIPHY's API, leading to a differential access to data that would weaken competing social media platforms' ability to compete in the supply of social media services (as well as, potentially, digital advertising services, as set out at §16 above).

29. Meta's past conduct in relation to digital acquisitions demonstrates that the scenario canvassed above is a real possibility. In 2014, Meta notified the Commission of its acquisition of the messaging service WhatsApp. Meta informed the Commission at the time of the merger that it would not be able to *"establish reliable automated matching between Facebook users' accounts and WhatsApp users' accounts"*. However, in August 2016, WhatsApp announced updates to its terms of service and privacy policy, including the possibility of linking WhatsApp users' phone numbers with Meta users' identities. Meta was fined a total of €110 million by the Commission for providing incorrect or misleading information.[18]

30. Further, due to the fact that the markets which the Merger concerns are dynamic and fast-moving, no pre-determined time period would suffice to alleviate the concerns raised by the Vertical SLC. Meta's dominance in the markets for social media and digital advertising continues to increase. In the Digital Markets Study, the CMA found that:

(a) Facebook has significant market power in display advertising. It accounts for over half of display advertising revenues and is seen as a 'must have' platform for many advertisers because of its reach. It has a significant data advantage over smaller

would be one of the assets that is transferred or acquired by a third party. You acknowledge that such transfers may occur, and that any acquirer of us or our assets may continue to use your Personal Data as set forth in this policy."

[18] See: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1369.

platforms and publishers, which both increases the value of its advertising inventory and creates additional barriers for its competitors to overcome;[19] and

(b) it was clear from the CMA's assessment of the barriers to entry in these markets, the market dynamics over the last decade, and the extent of the protective 'ecosystems' that each platform has built around its core service, that the likelihood of a new entrant successfully displacing Google or Facebook in the foreseeable future is low.[20]

31. Addressing the Vertical SLC requires a longer-term view of the social media and digital advertising markets. The CMA has appropriately recognised that implementing structural change is necessary to prevent harms to consumers, and other stakeholders, which arise from the market power held by Meta and the consequent incentives and ability which it has to foreclose competition. Following the five-year period in which Meta commits to maintaining open access for APIs, it may still be dominant and thus able to abuse its position in online markets by seeking to foreclose its competitors.

No other behavioural remedies can remedy the Vertical SLC

32. Even if Meta was to implement an indefinite and strict 'data silo' (i.e. a separation of data held by GIPHY, under the supervision of a Monitoring Trustee, which forbade Meta from processing any personal data held by GIPHY for targeted advertising purposes) this would still be unable to properly and effectively address the data foreclosure component of the Vertical SLC, for the following reasons.

33. **First**, there are considerable problems in relation to the practicality and effective implementation of maintaining a separation of data or a 'data silo'. PI notes that, according to the CMA, while Meta suggested a remedy preventing it from using personal data by GIPHY for advertising purposes, it did not provide any further details with regard to the implementation of a data separation.[21]

[19] Digital Markets Study, Section 5 summary, page 211.
[20] Digital Markets Study, §6.6.
[21] Decision, §11.211.

(a) From a purely operational standpoint, Meta would likely migrate GIPHY data into its infrastructure. This would increase the possibility of a future 'cross-contamination' of data or mission change, even if the systems were isolated. This is what appears to have happened after the WhatsApp merger, as noted above.

(b) Techniques such as robust anonymisation of personal data, which might be used to keep data sets separate, are very difficult to implement effectively. Measures that may be effective today may not be tomorrow.[22] New techniques are regularly developed which allow re-identification of individuals; this is especially true for high-dimensional and granular data such as that processed by GIPHY. A primary source of value in GIPHY's data may be the possibility of building machine learning models. Even if these models are not explicitly intended to match individuals between datasets, they could potentially be at risk of 'model inversion', where models themselves contain traces of the personal data they were trained on. It is hard to see how a tech giant like Meta could ever be in a position to effectively achieve data separation without any potential risk of 'cross-contamination' and, consequently, abide by any relevant commitments in relation to the anonymisation of this data.

(c) In addition to the concerns outlined above, even if a 'data silo' were to be implemented, Meta has not specified the exact staffing boundaries that would be in place in relation to the Meta employees that would be granted access to the data in question. For example, it is unclear whether there would be a 'GIPHY team' within

[22] In 2015, researchers at Harvard University found vulnerabilities in the anonymisation procedures used for health care data in South Korea that enabled them to de-anonymise patients with a 100% success rate and to decrypt the Resident Registration Numbers included with prescription data relating to deceased South Koreans. The unique 13-digit codes enabled full reidentification. In the UK, medical information is held on the NHS Personal Demographics Service is identified by the patient's ten-digit NHS number. In the UK, Cambridge University security engineer Ross Anderson noted that the problem is that 800,000 NHS employees need access to the PDS; Hampshire GP Neil Bhatia agreed that the large number of users means that access can't be audited or controlled and relies on trust, Alexander Martin, Has somebody shared your 'anonymised' health data? Bad news, The Register, 2 October 2015, https://www.theregister.co.uk/2015/10/02/s_korean_anonymised_health_data_sharing_a_breach_in_waiting. Similarly, in a more recent study, researchers were able to demonstrate that, despite the anonymisation techniques applied, "data can often be reverse engineered using machine learning to re-identify individuals.", Luc Rocher, Julien M. Hendrickx and Yves-Alexandre de Montjoye, Estimating the success of re-identifications in incomplete datasets using generative models, Nature Communications volume 10, Article number: 3069 (2019), https://www.nature.com/articles/s41467-019-10933-3.

Meta whose activities and tasks would be kept separate from those of other Meta employees in the policy, legal, marketing or advertising teams. It is also unclear how Meta's design tools, hardware and philosophy will be adapted to meet the technical requirements of a remedy requiring it to implement data separation.

34. **Second**, while Meta did not detail the scope and modalities of implementation of a 'data silo', PI notes that it would be extremely difficult, if not impossible, to identify accurately and exhaustively the categories of personal data that would have to be subject to a 'data silo' remedy. This is because disparate and seemingly innocuous data can be combined to create a meaningful, often comprehensive profile of a person.[23] Advances in data analytics, as well as machine learning, have made it possible to derive, infer and predict sensitive data from ever more sources of data, even if the original data is not sensitive. For instance, emotional states, such as confidence, nervousness, sadness, and tiredness can be predicted from typing patterns on a computer keyboard.[24] The very same techniques have made it easier to de-anonymise data and to identify unique individuals from data about their behaviour across devices, services and even in public spaces.[25] Such analyses mean that the outcome of the data analysis is greater than the sum of its parts: even publicly available / seemingly innocuous data can be used together to obtain insight and inferences about sensitive details of an individual's life.

35. **Third,** and more generally, Meta's past history in respect of privacy commitments made to regulators, in the context of antitrust or data privacy investigations, casts doubt on the effectiveness of behavioural remedies.

    (a) As noted above, in May 2017, the Commission fined Facebook €110 million for providing incorrect or misleading information during its 2014 acquisition of WhatsApp.[26] At the time of the acquisition, Facebook assured the Commission that it would not be able to link its accounts database to that of WhatsApp. After the

[23] Privacy International, *A snapshot of corporate profiling*, April 2018, https://privacyinternational.org/long-read/1721/snapshot-corporate-profiling

[24] Clayton Epp and others, 'Identifying emotional states using keystroke dynamics' (Proceedings of the SIGCHI Conference on Human Factors in Computing Systems May 2011) https://dl.acm.org/doi/10.1145/1978942.1979046 , 715- 724.

[25] de Montjoye, Y.-A., Hidalgo, C.A., Verleysen, M. & Blondel, V.D. Unique in the Crowd: The privacy bounds of human mobility. Nature srep. 3, 1376; DOI:10.1038/srep01376 (2013) https://www.nature.com/articles/srep01376.

[26] See: https://ec.europa.eu/commission/presscorner/detail/pl/IP_17_1369.

merger, Facebook went on to implement that linkage, and the Commission found that Facebook staff knew even in 2014 that it was technically possible to do so.[27]

(b) Further, Meta's practices in relation to competition and data privacy laws have been the subject of extensive regulatory scrutiny, with regulators fining or condemning the company globally. By way of example:

(i) In November 2011, the US Federal Trade Commission (the "**FTC**") charged Facebook with repeatedly breaking the privacy promises it made to users.[28] Among the list of deceptive practices and incidents in the FTC's complaint were December 2009 changes Facebook made to its site that publicly exposed information that users might have marked private, such as their Friends lists; Facebook's failure to certify the security of apps participating in its Verified Apps programme, as the company said it would; the company's reneging on its promise not to share users' personal information with advertisers; and allowing access to the content in deactivated or deleted accounts after saying that information would be inaccessible. The FTC also criticised Facebook for telling users they could restrict access to their data to limited audiences such as "Friends Only", but not preventing that information from being shared with third-party applications their Friends used.[29] Facebook agreed to settle the charges by way of consent decree.

(ii) In September 2017, the Spanish national data protection regulator fined Facebook €1.2 million, alleging that the company collected personal information from Spanish users that could then be used for advertising, despite the fact that users had closed their accounts more than a year ago. The investigation, which took place alongside others in Belgium, France, Germany and the Netherlands, found three cases in which Facebook had collected information such as gender, religious beliefs,

[27] See: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1369

[28] See:https://www.ftc.gov/news-events/press-releases/2011/11/facebook-settles-ftc-charges-it-deceived-consumers-failing-keep.

[29] See: Marguerite Reardon, *Facebook's FTC consent decree deal: What you need to know*, CNET, 14 April 2018: https://www.cnet.com/news/facebooks-ftc-consent-decree-deal-what-you-need-to-know/.

personal tastes, and browsing histories of millions of Spanish users without disclosing to them how the information would be used and, in the case of data collected on third-party websites, without obtaining their consent.[30]

(c) These examples provide a worrying blueprint of what might occur should the Tribunal find that the Divestiture Remedy imposed by the CMA to have been disproportionate. Meta's track record of non-compliance with its own behavioural commitments suggests that one cannot have complete confidence that any commitments made in relation to this Merger will be fully or adequately implemented by Meta. This means that they will not remedy the Vertical SLC which they are designed to address.

CONCLUSION

36. For the reasons set out above, PI submits that even if the Tribunal finds in Meta's favour in respect of its challenge to the CMA's finding of a Horizontal SLC, the Divestiture Remedy remains a proportionate response to the Vertical SLC alone.

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4 March 2022

[30] See: https://www.reuters.com/article/us-facebook-spain-fine/facebook-fined-1-2-million-euros-by-spanish-data-watchdog-idUSKCN1BM1OU.