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THE FACEBOOK/GIPHY DIVESTITURE: THE (NEW) FIRST OF MANY?

Abstract

The decision of the Competition and Markets Authority ordering Facebook's divestiture of GIPHY stands as a landmark to expedite on-going worldwide merger control reform, namely through the imposition of structural remedies upon Big Tech. The theories of harm considered in Facebook/GIPHY are not particularly novel: the competition authority puts forward the loss of competition, as well as the loss of innovation theories of harm, on the basis of the dynamic characteristics of digital markets. However, the low threshold placed by the authority to find a substantial lessening of competition has been decisive towards the order's final outcome.

The decision has made its comeback on the past experience with Big Tech by placing the spotlight on small-scale but significant takeovers, in the same light of the Guidance issued by the European Commission on the interpretation of article 22 of Merger Regulation 139/2004. Meanwhile, Facebook's acquisitions over WhatsApp and Instagram are being contested by the Federal Trade Commission before the United States' District Court for the District of Columbia. As opposed to legal certainty, time and scope have not been an obstacle to revert the deal. The acquisition was signed off in May 2020 for $400 million, and the CMA's merger control proceedings did not start until June 2020.

Although there was no overlap in relevant commercial activity within the UK, the competition authority's decision is called to have universal repercussions, notwithstanding the foregoing Australian Competition and Consumer Commission's investigation on the same acquisition as well as the outcome of the Austrian Federal Competition Authority's proceedings. The steadiness of the Facebook/GIPHY operation is at stake and a conflicting decision can still jeopardise the CMA's ruling on a global scale, deeming it a symbolic decision.

The order to revert the acquisition came as a consequence of the fact that the CMA considered Facebook's proposed behavioural remedies as insufficient, notwithstanding some of them were close to the interoperability mandates set out under the DMA, namely, to maintain an open access to GIPHY's library and database to existing API partners. Similar commitments were offered by the merging parties on the Google/Fitbit merger scrutinised by the European Commission and were accepted. The ambivalence on the results to prevent Google from degrading interoperability with Android via API is still in liege, and the CMA has chosen to reject behavioural remedies almost by default.

The paper will address the aftermath of the CMA's Facebook/GIPHY decision in the light of the economic analysis performed around dynamic digital markets. To this aim, we will analyse: i) the existing overlaps on both undertakings' activities as opposed to the CMA's opinion that they are close substitutes at the horizontal level; ii) the strength of the 'killing' component of the merger, considering the differences between digital and pharma markets in relation to innovation; iii) the effectiveness of interoperability mandates within the Facebook/GIPHY merger as well as the general advantages and drawbacks associated to them in relation to the dynamic competition paradigm.

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SUMMARY

1 Introduction

On 30 November 2021, the Competition and Markets authority (CMA onwards) blocked the $400 million completed acquisition by Facebook, Inc. (now Meta Platforms, Inc) of GIPHY, Inc[1]. The UK competition authority deemed the commitments offered by Meta were not acceptable in connection with the risks posed by the merger in the immediate future within the UK display advertising market. On 9 June 2020, the CMA served an initial enforcement order to place a standstill on the operation until it rendered a decision on the market outcomes produced by the merger[2].

The infamous US based digital social network is integrated by three additional user-facing platforms, i.e., Instagram, WhatsApp, and Messenger. Facebook was incorporated in July 2004, and its family of apps are mainly monetised through the neighbouring market of display advertising. By the end of 2021, it produced 117 billion in revenue, mainly belonging to its results in advertising[3]. Its presence in the digital arena is unquestionable for competitors operating online, although the Federal Trade Commission (FTC) is currently putting forward an action to account for the abuse and consolidation of its dominant position[4].

[1] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* Competition & Markets Authority Final report of 30 November 2021.

[2] *Acquisition by Facebook, Inc. through its subsidiary Tabby Acquisition Sub, Inc. of GIPHY, Inc* Competition & Markets Authority Initial Enforcement Order made by the Competition and Markets Authority pursuant to section 72(2) of the Enterprise Act 2002 (the Act) of 9 June 2020.

[3] 'Meta Reports Fourth Quarter and Full Year 2021 Results' (*Meta*, 2 February 2022) <https://investor.fb.com/investor-news/press-release-details/2022/Meta-Reports-Fourth-Quarter-and-Full-Year-2021-Results/default.aspx> accessed 2 June 2022.

[4] 'FTC Alleges Facebook Resorted to Illegal Buy-or-Bury Scheme to Crush Competition After String of Failed Attempts to Innovate' (*Federal Trade Commission*, 19 August 2021) <https://www.ftc.gov/news-events/news/press-releases/2021/08/ftc-alleges-facebook-resorted-illegal-buy-or-bury-scheme-crush-competition-after-string-failed> accessed 2 June 2022.

has been the first opportunity open to the CMA to endorse the conclusions that it developed around Facebook's strategic position as a gatekeeper in the UK economy[6].

As opposed to Facebook's super dominance on social media and messaging services, GIPHY is the world's leading provider of GIFs and GIF stickers through its online database and search engine, although it has no financial or economical presence in the UK[7]. Although the start-up was founded and launched in 2013 by Alex Chung and Jace Cooke in New York, it immediately picked up its own pace[8]. In fact, it attracted around a million users during its first week, and it quickly integrated with Twitter and Facebook[9]. Pre-merger, its prospects were unpromising in terms of their capacity to produce enough revenue to cover hosting costs as a result of increasing traffic produced by the Coronavirus (COVID-19) pandemic.

This is the first time the CMA imposes a divestiture remedy of this type against a digital player after the starting gun was fired on its on-going reform on digital markets (and after Brexit, too), and the Competition Appeal Tribunal dismissed the substantial arguments presented by Meta in appeal[10]. The European Commission (EC onwards) has

Markets Authority, 'Online platforms and digital advertising (Digital Markets Unit)' 1 July 2020; Will Hayter, 'Digital markets and the new pro-competition regime' (*Competition and Markets Authority Blog*, 10 May 2022) <https://competitionandmarkets.blog.gov.uk/2022/05/10/digital-markets-and-the-new-pro-competition-regime/> accessed 4 June 2022.

[6] Tom Smith, 'CMA blocks the Facebook/GIPHY merger: you can't say they didn't warn us' (*The Platform Law Blog,* 7 December 2021) <https://theplatformlaw.blog/2021/12/07/cma-blocks-the-facebook-GIPHY-merger-you-cant-say-they-didnt-warn-us/> accessed 26 January 2022; Tom Smith and Simay Erciyas, 'The Competition and Markets Authority blocks the Meta/Giphy merger: you can't say they didn't warn us' (2022), <https://doi.org/10.4337/clj.2022.01.04> accessed 1 June 2022.

[7] As per the CMA's definition: *A GIF* -that stands for Graphic Interchange Format- *(or video GIF) is a digital file that displays a short, looping, soundless video, while a GIF sticker displays an animated image comprised of a transparent (or semi-transparent) background which is placed over images or text (such as a Story on Instagram or Snapchat).*

[8] Riley Winn, 'The man, the GIF, the legend: An interview with Giphy founder Alex Chung' (*digitaltrends*, 28 April 2019) <https://www.digitaltrends.com/web/giphy-founder-alex-chung-interview/> accessed 2 June 2022.

[9] Jacob Kastrenakes, 'Giphy brings animated GIFs to Facebook' (*The Verge*, 29 August 2013) <https://www.theverge.com/2013/8/29/4671718/giphy-brings-animated-gifs-to-facebook> accessed 2 June 2022; Ken Yeung, 'This could get messy: Giphy brings animated GIFs to your Twitter timeline' (*The Next Web*, 14 November 2013) <https://thenextweb.com/news/get-messy-giphy-brings-animated-gifs-twitter-timeline> accessed 2 June 2022.

[10] *Meta Platforms, Inc. v. Competition and Markets Authority* [2022] CAT 26; Josh White, 'Facebook appeals CMA's blocking of Giphy acquisition' (*ShareCast*, 6 March 2022) <https://www.sharecast.com/news/news-and-announcements/facebook-appeals-cmas-blocking-of-giphy-acquisition--8977920.html> accessed 4 June 2022; Katharine Gemmell, 'Meta Calls U.K. Tech Watchdog's Giphy Decision 'Irrational'' (*Bloomberg*, 25 April 2022) <https://www.bloomberg.com/news/articles/2022-04-25/meta-set-for-court-showdown-over-giphy-with-u-k-s-tech-watchdog> accessed 4 June 2022; August Graham, 'Tribunal backs competition watchdog over Facebook's Giphy takeover' (*Evening Standard*, 14 June 2022) <https://www.standard.co.uk/news/uk/competition-and-markets-authority-facebook-meta-innovation-giphy-b1006154.html> accessed 15 July 2022; Kate Beioley, 'Meta fails to overturn Giphy sale order

rarely imposed divestiture remedies within merger control that have resulted to be successful, although the Remedies Notice contains a general preference to go structural on those mergers where horizontal overlaps tend to eliminate competition[11]. Even EU Commissioner Margrethe Vestager has expressed her preference for behavioural remedies in digital mergers[12]. This same position is also new to the antitrust enforcement performed overseas, where structural remedies have become scarcer over time. Since the AT&T divestiture, the FTC has not sought or achieved divestiture in merger control effectively, notwithstanding the current debate on the breakup of Facebook from Instagram and WhatsApp[13]. However, the FTC's renewed enforcement priorities are moving towards an approach favouring the imposition of structural remedies[14].

On top of this, the events following the initial merger have been characterised by the subsequent fining of Facebook by the CMA due to non-compliance of the initial enforcement order issued by the CMA at the start of the review in June 2020 (fines amounting to £50.5 million and £1.5 million were imposed on October 2021 and February 2022)[15].

order by UK competition regulator' (*Financial Times*, 14 June 2022) <https://www.ft.com/content/8add1876-7674-4f21-bea4-fb1b82e6285d> accessed 15 July 2022.

[11] Thomas Wilson, 'Merger remedies – is it time to go more behavioural?' (*Kluwer Competition Law Blog*, 21 February 2020) <http://competitionlawblog.kluwercompetitionlaw.com/2020/02/21/merger-remedies-is-it-time-to-go-more-behavioural/> accessed 10 February 2022; Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 [2008] OJ C267, paras 17 and 61. For instance, accounting for a recent 'completed' divestiture failure: Case M. 8974 *NIDEC/Whirlpool (Embraco Business)* [2020] C(2020) 3118 final.

[12] Margrethe Vestager, 'Defending competition in a digital age' (Florence Competition Summer Conference, Florence, June 2021).

[13] Hiba Hafiz, 'Rethinking Breakups' (2021) Boston College Law School Legal Studies Research Paper No. 566 <https://dx.doi.org/10.2139/ssrn.3892326> accessed 10 February 2022; Andrew Beattie, 'A History of U.S. Monopolies' (*Investopedia*, 7 October 2021) <https://www.investopedia.com/insights/history-of-us-monopolies/> accessed 10 February 2022.

[14] Alex Wilts, 'Khan lists potential updates to merger guidance, draft expected in "coming months"' (*Global Competition Review*, 9 May 2022) <https://globalcompetitionreview.com/gcr-usa/article/khan-lists-potential-updates-merger-guidance-draft-expected-in-coming-months> accessed 4 June 2022. For instance, 'FTC sues to block two hospital mergers' (*American Hospital Association*, 3 June 2022) <https://www.aha.org/news/headline/2022-06-03-ftc-sues-block-two-hospital-mergers> accessed 4 June 2022.

[15] *Acquisition by Facebook, Inc. through its subsidiary Tabby acquisition sub, Inc. of GIPHY Inc.* Competition and Markets Authority Initial Enforcement Order made by the Competition and Markets Authority pursuant to section 72(2) of the Enterprise Act 2002; Competition and Markets Authority, 'CMA fines Facebook over enforcement order breach' <https://www.gov.uk/government/news/cma-fines-facebook-over-enforcement-order-breach> accessed 7 February 2022; Competition and Markets Authority, 'CMA fines Meta a second time for breaching enforcement order' <https://www.gov.uk/government/news/cma-fines-meta-a-second-time-for-breaching-enforcement-order> accessed 7 February 2022.

Pre-acquisition, GIPHY's investors were paid dividends lowering the value of the company's assets[16]. Therefore, when the merger was completed, it did not meet the $18.8 million size-of-person test required under the FTC's regulations and was counted as non-reportable[17]. A reaction from any of the top-leading competition authorities was to be expected. The UK, Austrian and Australian competition authorities took it onto their own hands to assess the potential implications of the merger given that thousands of UK -Australian and Austrian- users daily access GIPHY's library and database through the Internet[18].

Contrary to the EU principle of one-stop merger control, the merger's clearance faces great jurisdictional extraterritorial challenges. The CMA has ordered divestiture, whereas the Australian Competition and Consumer Commission (ACCC) initiated proceedings on 8 June 2020 and has not yet rendered its decision, which could result conflicting with the divestiture package ordered by the CMA[19]. On top of that, by 23 June 2022, the Austrian Supreme Cartel Court confirmed the merger's clearance, pursuant to Phase II proceedings initiated by the Federal Competition Authority and followed by the Higher Regional Court Vienna acting as the Federal Cartel Court[20]. The Austrian Federal Competition Authority had already imposed a fine of 9.6 million euro due to the acquisition's violation of the standstill obligation, insofar as the merger had not been notified in Austria[21].

One of the main questions stemming from the CMA's decision is whether interoperability remedies, like those to be mandated by virtue of the Digital Markets Act

[16] David McLaughlin, 'Facebook's Stealth M&A Puts Focus on Deals Under Antitrust Radar' (*Bloomberg*, 23 August 2021) <https://www.bloomberg.com/news/articles/2021-08-23/facebook-s-stealth-m-a-puts-focus-on-deals-under-antitrust-radar?sref=P6Q0mxvj> accessed 10 February 2022.

[17] Hart-Scott-Rodino Antitrust Improvements Act of 1976 15 U.S.C. § 18a; Katie Canales, 'The sneaky way Facebook reportedly got its $400 million GIPHY acquisition under regulatory radar is completely legal, experts say' (*Insider*, 26 August 2021) <https://www.businessinsider.com/GIPHY-facebook-dividends-payment-deal-antitrust-2021-8> accessed 8 February 2022.

[18] Rod Sims, 'The ACCC's Digital Platforms Inquiry and the need for competition, consumer protection and regulatory responses' (Australia-Israel Chamber of Commerce, Western Australia, August 2020); 'Facebook/GIPHY merger: AFCA files request for examination with Cartel Court' (*Federal Competition Authority*, 18 June 2021) <https://www.bwb.gv.at/en/news/detail/facebook-giphy-merger-afca-files-request-for-examination-with-cartel-court> accessed 15 July 2022.

[19] Email from Australian Competition and Consumer Commission to author (2 February 2022).

[20] 'Meta(Facebook)/Giphy merger: AFCA appealing against conditional clearance' (*Federal Competition Authority*, 4 March 2022) <https://www.bwb.gv.at/en/news/detail/meta-facebook-giphy-merger-afca-appealing-against-conditional-clearance> accessed 15 July 2022; 'Meta(Facebook/Giphy merger: Supreme Cartel Court confirms Cartel Court's conditional clearance' (*Federal Competition Authority*, 24 June 2022) <https://www.bwb.gv.at/en/news/detail/submetering-cartel-decision-relating-to-ista-oesterreich-gmbh-final-1> accessed 15 July 2022.

[21] 'Austrian Federal Competition Authority files application to fine Facebook for failing to notify GIPHY acquisition' (*Federal Competition Authority*, 7 June 2021) <https://www.bwb.gv.at/en/news/detail/austrian-federal-competition-authority-files-application-to-fine-facebook-for-failing-to-notify-giph> accessed 15 July 2022.

(DMA onwards) are enough to halt the disruptive advance of digital platforms in neighbouring markets, such as those of online display advertising[22].

We will analyse the reasons given by the CMA to block the Facebook/GIPHY merger. First, we will consider the special impact of GIPHY's recent developments on monetising its content through advertising and sponsoring (Paragraph 2). Then, we will overview the merger's implications from the vertical and horizontal viewpoint, with an attention to the economic analysis performed by the competition authority (Paragraph 3). Finally, we will make an overview on interoperability remedies applied to the Facebook/GIPHY merger and considering the ruling's consequences overseas and on antitrust/regulatory intervention (Paragraph 4).

2 Account of GIPHY's worldwide position

Facebook's business model and dominance has been scrutinised from an antitrust perspective throughout the Globe. In the case of the UK, the CMA issued in July 2020 its final report on online platforms and digital advertising, where it warned against the firm's super dominance. However, the target of the merger, GIPHY, Inc., has received little attention up until this day. We will look at the characteristics that make a GIF distinctive from other digital services and features, and then we will analyse the singularity of the Paid Alignment Business Model, which is the prime instrument devised by GIPHY to monetise its activity.

2.1 A GIF explained

GIFs are an extremely popular form of content used on social media and messaging apps[23]. They have turned to be ubiquitous online as a form of social expression. Traffic on GIPHY has increased dramatically to 700 million users accessing more than 10 billion GIFs per day as of May 2020.

GIFs are displayed in a completely different environment as opposed to that of advertising within a social network. The intentions of users are also different: whereas social media platforms account for their actual feelings and thoughts through images, texts, or interactions shared between users, a GIF is used to express a particular idea or

[22] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) [2020] COM (2020) 842 final; and 'leaked' text in 'The leaked (almost final) DMA text' (*Chillin' Competition*, 20 April 2022) <https://chillingcompetition.com/2022/04/20/the-leaked-almost-final-dma-text/> accessed 4 June 2022; Council of the EU, 'Digital Markets Act (DMA): agreement between the Council and the European Parliament' (25 March 2022) <https://www.consilium.europa.eu/en/press/press-releases/2022/03/25/council-and-european-parliament-reach-agreement-on-the-digital-markets-act/> accessed 18 June 2022

[23] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA para 4.8 and 4.43.

texts, or interactions shared between users, a GIF is used to express a particular idea or emotion to the recipient (given that both the recipient and the sender share the same knowledge on the GIF's meaning)[24].

They are mainly based on the personal and communal common grounds of the relationship between them both: they must manage and interpret the impressions portrayed through the GIF and the context in which it is rendered[25]. GIFs are a form of polysemic non-verbal communication to express complex emotions and feelings and can contain multiple layers of meaning, beyond the expressions words and photographs can depict. They are particularly helpful when users cannot adequately express their nuanced emotions or gestures through these forms of expression[26].

Since the GIF is context-dependent on the conversation taking place or the content that accompanies it, it is malleable regardless of its actual content and can be easily decontextualised. For instance, the Michael Jackson eating popcorn within the 1982 Thriller videoclip GIF is more prone to illustrate a sensation of expectation, and not be used in reference to Jackson's track record[27]. Different to emojis, that are developed top-down into devices, GIFs are displayed in a community-oriented format and operate within their context (as little as two persons through instant messaging or as big as Twitter when a GIF is displayed through a tweet)[28].

The effect of GIFs, caused by their content and time span, is different to other digital services: they operate on a loop (so they have a high 're-review rate') and in a short time span -two to five seconds-[29]. The animation's speed of movement and length can be tailored to carve out user engagement[30]. In fact, shorter, higher quality GIFs with more frames per second are the most attractive[31]. User engagement performed by GIFs can be drawn out directly from their virality, as a measure to their capacity to travel across

[24] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA para 40.
[25] Aaron Jiang, Casey Fiesler, Jed R. Brubaker, '" The Perfect One": Understanding Communication Practices and Challenges with Animated GIFs' (2018) 2(CSCW) Proceedings of the ACM on Human-Computer Interaction, 1; Jackson Tolins and Patrawat Samermit, 'GIFs as Embodied Enactments in Text-Mediated Conversation' (2016) 49(2) Research on Language and Social Interaction 75.
[26] Saeideh Bakhsi, David A. Shamma, Lydon Kennedy, Yale Song, Paloma de Juan and Joseph Kaye, 'Fast, Cheap, and Good: Why Animated GIFs Engage Us' (2016 CHI Conference on Human Factors in Computing Systems, San Jose, May 2016); Eli Bourlai and Susan Herring, 'Multimodal communication on tumblr: "I have so many feels!"' (WebSci' 2014, Indiana, June 2014); Kate M. Miltner and Tim Highfield, 'Never Gonna GIF You Up: Analyzing the Cultural Significance of the Animated GIF' (2017) July-September Social Media + Society 1.
[27] Miltner and Highfield (n 26).
[28] Miltner and Highfield (n 26).
[29] *Completed acquisition by Facebook, Inc. of GIPHY, Inc.* Summary of third-party calls para 19.e.
[30] James Ash, 'Sensation, Networks and the GIF: Toward an Allotropic Account of Affect' in Ken Hillis, Susanna Paasonen and Michael Petit (eds.), *Networked Affect* (MIT Press, 2015).
[31] Bakhsi, Shamma, Kennedy, Song, de Juan, and Kaye (n 26).

time and space to a large audience based on cultural and pop trends[32]. For instance, the most popular GIFs of 2021 account for the most viewed TV show during the COVID-19 quarantine: the 2005-rebooted *The Office* and one of the most popular shows viewed worldwide, The Weeknd's NFL Halftime Performance[33]. The most popular GIFs have entered the common lexicon since they are regularly posted and used across online messaging and communities[34].

Against this framework, GIPHY has enhanced the design of its services so that its search engine is adjusted to render quick and targeted responses to the queries posed by users, so keywords are efficiently matched to a GIF or a GIF sticker within a few seconds.

2.2 GIPHY's business model vis-à-vis digital platforms

GIFs and GIF stickers are available via GIPHY's own website and app, and through the interface of apps that integrate GIPHY's database. Apps such as Facebook, Instagram, WhatsApp, or Snapchat incorporate the GIPHY database through Application Programming Interfaces (APIs)[35] and Software Development Kits (SDKs)[36]. These social networks embed GIPHY's and Google Tenor's libraries within their GIF search engines.

As customary on online services, GIPHY provides its services for free[37]. On most digital platforms, the gratuity of services is explained through their multi-sided nature[38]. The possible combinations on the monetisation business models across platforms are unlimited. For example, Facebook feeds off from both direct and indirect network effects[39]. On one hand, Facebook's popularity attracts more users to join the digital platform. Taking the paradox of the invention of the telephone, if friends or family do not

[32] Ash (n 31).
[33] Afprelaxnews, 'The 10 most popular GIFs in 2021: From Stanley Hudson in 'The Office' to Baby Yoda's joy and excitement' (*Forbes India*, 18 December 2021) <https://www.forbesindia.com/article/lifes/the-10-most-popular-gifs-in-2021-from-stanley-hudson-in-the-office-to-baby-yodas-joy-and-excitement/72293/1> accessed 11 February 2022.
[34] Bakhsi, Shamma, Kennedy, Song, de Juan, and Kaye (n 26).
[35] An API is the software interface that allows users to use and navigate mobile apps and an SDK provides tools for third-party host apps such as TikTok or Snapchat to program GIPHY¡s library so that its style and functionality is aligned with the app's own interface and design.
[36] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* Competition & Markets Authority para 10.
[37] Anja Lambrecht, Alessandro Bonatti, Avi Goldfarb, Anindya Ghose, Daniel G. Goldstein, Randall Lewis, Anita Rao, Navdeep Shani and Song Yao 'How Do Firms Make Money Selling Digital Goods Online?' (9th Triennial Choice Symposium, Noordwijk, 2014).
[38] David S. Evans and Richard Schmanlensee, 'The Antitrust Analysis of Multi-sided Platform Businesses' (2013) National Bureau of Economic Research 18783 <https://www.nber.org/papers/w18783> accessed 11 February 2022.
[39] Hal Varian, 'Use and abuse of network effects' (2017) <https://ssrn.com/abstract=3215488> accessed 11 February 2022.

family do not own a telephone, how are you supposed to extract any value from owning it yourself? The direct network effects applicable to digital platforms play on the same rule: insofar as more friends and members of your family join the platform, its value increases personally for you, when you can interact with a higher number of acquaintances.

On the other hand, users on Facebook are not only those consumers who wish to share their experiences online, but also advertisers who wish to display their offerings to them. The digital platform's role is to intertwine the demands of these customer groups[40]. Facebook facilitates their interaction and charges advertisers for displaying their ads on their webpage, at a marginal cost of production near zero[41]. Therefore, advertisers subsidise user experience in exchange for the space that has been rendered for them through the social network[42].

Facebook uses aggregators that place cookies on their devices to track their preferences and behaviour both on the social network and online to tailor and personalise advertising, so ads yield as effective as possible and remain to be attractive for advertisers and not excessively intrusive for users[43].

The 'non-commercial' user can access Facebook's services for free, experiencing low marginal costs on consumer search and transaction costs[44]. However, users do 'pay' for Facebook's service through the tasks of data accumulation and processing that the social network can perform by virtue of the personal and non-personal data they produce whilst navigating online[45]. Facebook's monetisation business model is mainstream for most digital players.

[40] Evans and Schmalensee (n 38).
[41] Lambrecht, Bonatti, Goldfarb, Ghose, Goldstein, Lewis, Rao, Shani and Yao (n 37); Simon P. Anderson, Øystein Foros, Hans Jarle Kind and Martin Peitz, 'Media market concentration, advertising levels, and ad prices' (2012) 30(3) International Journal of Industrial Organization 321.
[42] Wilko Bolt and Alexander F. Tieman, 'Heavily skewed pricing in two-sided markets' (2008) 26 International Journal of Industrial Organization 1251; Jörg Claussen, Tobias Kretschmer and Philip Mayrhofer, 'Incentives for Quality over Time – The Case of Facebook Application' (2012) CEP Discussion Papers, <https://ideas.repec.org/p/cep/cepdps/dp1133.html> accessed 1 June 2022.
[43] Tami Kim, Kate Barasz and Leslie K. John, 'Why Am I Seeing This Ad? The Effect of Ad Transparency on Ad Effectiveness' (2019) 45 Journal of Consumer Research 907; Jordan L. Fischer, 'Web Cookies and Shadow Data Collection: The Legal Implications' (*ABA*, 6 May 2020) <https://www.americanbar.org/groups/business_law/publications/committee_newsletters/cyberspace/2020/202005/fa_2/> accessed 11 February 2022; Susan Athey and Joshua S. Gans, 'The Impact of Targeting Technology on Advertising Markets and Media Competition' (2010) 100(2) The American Economic Review 608; Ramon Casadesus-Masanell and Hanna W. Halaburda, 'When Does a Platform Create Value by Limiting Choice?' (2010) Harvard Business School Working Paper, No. 11-030, <http://www.hbs.edu/research/pdf/11-030.pdf> accessed 1 June 2022.
[44] Lambrecht, Bonatti, Goldfarb, Ghose, Goldstein, Lewis, Rao, Shani, and Yao (n 37); David S. Evans, 'The Antitrust Economics of Free' 7(1) Competition Policy International 71.
[45] Howard Beales and Jeffrey A. Eisenach, 'An Empirical Analysis of the Value of Information Sharing in the Market for Online Content' (2014) <https://ssrn.com/abstract=2421405> accessed 11 February 2022.

However, GIPHY's model does not adjust to this same pattern. GIFs are offered for free to consumers and to business users or API/SDK partners[46]. Not only that, but the tool is especially relevant for API partners since it improves their user engagement and brand awareness. Therefore, if GIFs are not available in a particular platform such as Facebook, users may be dissatisfied with their general experience in relation to the service provided by the social network, given that GIFs and GIF stickers are a novel form of expression.

Most of GIPHY's traffic depends on the services rendered to API partners, and Facebook accounts for a large percentage of its global traffic[47]. GIPHY does not receive key data on user performance since they perform actions on apps and websites of API partners. Therefore, the GIF provider does not process or collect first-party data that is core for most digital platforms. Instead, it can only capture essential and raw data from the agreements it enters into with its API partners, similar to other digital products and services. In spite of that, GIPHY will only obtain raw data on the aggregated popular keywords of the moment and search terms. This data is not valuable for the purpose of advertising when it cannot account for the insights and impact of particular changes and actions performed by the search engine in a granular and substantial way.

Up until 2017, GIPHY chose not to monetise its services through the revenue it obtained from advertisers to subsidise the experience and services catered to final consumers. As shown above, GIPHY is not comparable to mainstream online platforms, as it does not feed off from indirect network effects and feedback loops resulting from the collection and processing of data[48]. The GIF library cannot mimic the business model that leverages data to enhance user experience and personalised advertising, since it cannot offer adequate data on attribution and audience metrics to advertisers[49]. This is exactly why GIPHY has relied on venture capital for its financing up until now. Since 2018 it operated off $20 million, with a subsequential funding round amounting to $72 million on 2020[50]. Although counterintuitive, this business strategy led GIPHY to

[46] *Completed acquisition by Facebook, Inc. of GIPHY, Inc.* Latham & Watkins LLP Initial Phase 2 Submission EU-DOCS\32123250.23 para 2.6.

[47] *Completed acquisition by Facebook, Inc. of GIPHY, Inc.* Latham & Watkins LLP paras 3.1 and 5.8; Vishal Shah, 'Facebook Welcomes GIPHY as Part of Instagram Team' (*Meta*, 15 May 2020) <https://about.fb.com/news/2020/05/welcome-giphy/> accessed 23 February 2022.

[48] *Completed acquisition by Facebook, Inc. of GIPHY, Inc.* Latham & Watkins LLP para 5.11.c); Nico Neumann, Catherine E. Tucker and Timothy Whitfield, 'Frontiers: How Effective Is Third-Party Consumer Profiling and Audience Delivery? Evidence from Field Studies' (2019) 38(6) Marketing Science 918.

[49] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA para 39.

[50] Richard Best, 'GIPHY: How it Works and Makes Money' (*Investopedia*, 13 September 2021) <https://www.investopedia.com/articles/investing/022216/GIPHY-how-it-works-and-makes-money.asp> accessed 7 January 2022; Viktor, 'The GIPHY Business Model-How Does GIPHY Make Money?' (*Productmint*, 27 October 2021) <https://productmint.com/GIPHY-business-model-how-does-GIPHY-

its latest feat: the Paid Alignment Business Model, which was intended to exploit the base of captive users generated through its API Partners[51].

2.3 The paid alignment business model in the United States

From 2017 until May 2020 GIPHY offered its 'Paid Alignment' service to brands and advertisers[52]. In exchange for a fee, advertisers were offered a prevalent place within the GIF search engine so they would be displayed alongside the most popular GIFs according to daily and monthly trends or be aligned with one or multiple popular search terms or events[53]. For instance, Dunkin' Donuts purchased the reaction GIFs tied to the 3rd of June (the National Doughnut Day)[54]. At first, these agreements were only concluded through GIPHY's website and app, but they rapidly expanded onto its API distribution network[55].

This business model did not incorporate tangible and adequate direct response mechanisms that could measure attribution. In other words, advertisers and brands could only expect to generate brand awareness and user engagement but could not account and track any tangible economic value to the promoted content. According to third parties to the merger, advertisers could only monitor metrics such as the number of impressions of the content (CPM[56]) but could not provide data on return on investment (ROI[57])[58]. For instance, Dunkin' Donuts could account for the number of times that the GIFs generated from the National Doughnut Day were shared, but it could not tie that engagement on the side of the user to a particular action, i.e., purchasing a doughnut online or offline.

However, this did not seem to be a problem for GIPHY. Instead, it was its business model's main accomplishment. The advertised content was inserted in such a subtle

money/#:~:text=GIPHY%20Make%20Money%3F-,GIPHY%20makes%20money%20by%20helping%20to%20create%20as%20well%20as,on%20a%20per%2Dcampaign%20basis> accessed 7 February 2022.

[51] GIPHY, 'GIPHY Create' <https://GIPHY.com/create/gifmaker> accessed 11 February 2022; *Completed acquisition by Facebook, Inc. of GIPHY, Inc.* Latham & Watkins LLP para 5.6.

[52] Mark Bergen & Selina Wang, 'Google Buys Tenor, a GIF Search Tool That Advertisers Love' *Bloomberg* (New York, 27 March 2018).

[53] *Completed acquisition by Facebook, Inc. of GIPHY, Inc.* Latham & Watkins LLP para 7.13.

[54] Christine Lagorio-Chafkin, 'How This Massive Search Engine with $150 Million in VC Funding Is Finally Going to Make Money' (*Inc*, 8 June 2018) <https://www.inc.com/christine-lagorio/inside-GIPHYs-plan-to-make-money.html> accessed 7 February 2022.

[55] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA paras 2.8-2.9.

[56] CPM stands for cost-per-mille and refers to the cost of the advertisers per thousand impressions of its offering.

[57] ROI is a performance measure used for attributing profit and revenue growth to the impact of marketing initiatives.

[58] *Completed acquisition by Facebook, Inc. of GIPHY, Inc.* Summary of third-party calls para 22; *Completed acquisition by Facebook, Inc. of GIPHY, Inc.* Appendix F – GIPHY's Paid Alignment model para 2.

and intrinsic manner that it did not interrupt user experience. For example, one of the main results retrieved from the search of the acronym 'OMG' displayed on GIPHY is a loop of a Lyft ad. Although the GIF passes on a particular impression when shared between the receiver and the sender, it has the capacity to convey an advertised content. Not many advertisers are able to display their content on the messaging context, if any. Against this background, ads come with a certain air of credibility as opposed to tailored ads to their preferences on social networks that can be perceived as intrusive by users[59].

3 The dynamic component of the merger

The merger between Facebook and GIPHY was analysed through the lens of the dynamics of the digital arena. Prior to this analysis, the CMA had to determine if there was a relevant merger situation, in the light of the application of its national merger control regime and rules.

3.1 The jurisdictional challenges posed by the merger

Although both the acquirer and the target of the transaction are based in the United States, both the CMA and the Australian competition authority have applied their share of supply test which confers them with the jurisdictional powers to decide on the concentration's market outcomes, desirable or otherwise. Although the Austrian Federal Competition Authority applies a turnover threshold, on its Facebook/GIPHY case the value of both the acquirer and target were determined on the basis of their data-based significance by looking at GIPHY's unique visits in Austria in May 2020[60].

In the case of the UK competition authority, it applied its traditional two-step process to find that the merger was cognisable under the UK regime. First, it analysed whether the merger could be interpreted as triggering the disappearance of a relevant undertaking within the UK market. Later, due to the fact that the GBP70 million turnover threshold was not satisfied by GIPHY, the CMA analysed the plausibility of applying its share of supply test over the merger[61].

[59] *Completed acquisition by Facebook, Inc. of GIPHY, Inc.* Summary of third-party calls, para 19.a.
[60] Evelin Hlina, 'Merger Control: Adjustment of the local nexus under the transaction value threshold in Austria' (*Schonherr*, 12 January 2022) <https://www.schoenherr.eu/content/merger-control-new-developments-concerning-the-local-nexus-under-the-transaction-value-threshold/#:~:text=Pursuant%20to%20Austrian%20law%2C%20a,target%20company%20has%20significant%20domestic> accessed 16 July 2022.
[61] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA paras 3.1 and 3.20.

As expected, Facebook was found and quickly categorised as an undertaking in terms of the application of the UK merger regime[62]. However, the CMA had to make more of an effort to justify that GIPHY was an undertaking on these same terms, too.

To this end, the UK competition authority did not address the current state of things regarding GIPHY, but rather the set of steps that it had taken towards its ambition of being a profitable business[63]. For instance, the fact that GIPHY successfully completed a number of investment rounds in order to expand its commercial operations and further develop its services and goods, was highlighted throughout the CMA's analysis to prove that GIPHY was promoting itself to investors as a business[64]. Although the company was certainly not profitable, it raised $150.95 million in four rounds of funding. The competition authority could not go as far as saying that GIPHY, pre-merger, was a successful undertaking, at least from the UK perspective. Instead, it placed its main arguments on the plans the business had to generate revenue in the future, i.e., through the Paid Alignment Business Model. In fact, since 2019, GIPHY had endured losses insofar as its revenue levels were not sufficiently high to cover its operational costs, due to an increase in traffic, general uncertainty in the venture capital market and a slowdown in the advertising market.

Pursuant to the share of supply test provided in the UK merger control regime, the authority had a wide discretion to assess whether the merged enterprises either supply or acquire goods or services of a particular description in the UK, and would, post-merger, supply or acquire at least 25% or more of those goods or services in the UK[65]. By this token, the CMA captured the GIPHY phenomenon within digital communications as a whole and considered the supply of apps and websites that allow UK users to search for and share GIFs for the purpose of this analysis. Moreover, it calculated the shares of supply by reference to the average monthly searches performed by users on GIFs in general, be that through an app or directly through a website. The combined share of supply amounted to a 50-60 per cent: the searches run on Facebook accounted to this same percentage, whereas GIPHY only produced a 0-5% per cent of the estimate[66].

Notwithstanding the reduced impact of the supply of services from the perspective of the target, the UK competition authority established that the jurisdictional nexus to the UK was sufficiently justified due to the results produced by the share of supply test itself[67].

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[62] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA paras 3.7.
[63] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA paras 3.8-3.12.
[64] Michelle Castillo, 'Investors have bet more than $150 million that short animations are the future of communication' (*CNBC*, 17 March 2017) <https://www.cnbc.com/2017/03/17/giphy-why-investors-bet-150-million-on-gifs.html> accessed 4 June 2022.
[65] Enterprise Act 2002, s 23.
[66] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA paras 3.43 and 3.44.
[67] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA para 3.47.

3.2 Horizontal overlaps between Facebook and Giphy on the display advertising market

From the horizontal perspective, the CMA's theory of harm revolved around Facebook's 'killing' of GIPHY's Paid Alignment Business Model. In this context, the main concern was that the target had started to monetise its GIF library through the Paid Alignment Business model on the U.S. and Facebook discontinued this service once it acquired full control over GIPHY[68].

The competition authority considered GIPHY and Facebook have an important presence within the same level of the supply chain of the display advertising market[69]. To this end, the OECD has acknowledged that the identification of overlapping products and geographical areas for dynamic markets might come in as a difficult task. It has settled that a sensible solution to this problem is to establish horizontal and vertical overlaps between the undertakings on the basis of close substitutes within the market[70]. Correspondingly, the CMA points out that Facebook and GIPHY come in as close substitutes within the same market. This finding is instrumental to its final decision to order the divestiture, even though it recognises that their activities do not perfectly intersect at the horizontal level[71].

As pointed out before, Facebook offers the space of its social network to advertisers alongside with the data gathered about consumers to make behavioural and targeted advertising possible. Digital advertising is tailored to trigger an action. If the action that is intended to happen is performed by the user, the ad will be deemed effective and therefore will be more valuable for the advertiser. Against this background, as per the CMA's market study on online digital advertising, Facebook is the largest supplier of online display advertising expenditure with a share of 50-60 per cent, and therefore, it has significant market power in social media[72]. Stemming from Facebook's already established dominance on display advertising, the competition authority's decision is already prejudiced towards the outcome of a substantive lessening of competition[73]. As far as GIFs are concerned, Facebook does not host its proprietary GIF library on the wide range of platforms it owns. Rather, it integrates both of Google Tenor's and GIPHY's search engines and libraries for this purpose[74].

[68] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA paras 7.30-7.40.
[69] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA para 36.
[70] OECD, 'Merger control in dynamic markets' (*OECD*, 2020) <https://www.oecd.org/competition/merger-control-in-dynamic-markets-2020.pdf> accessed 9 March 2022.
[71] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA para 5.182.
[72] *Online platforms and digital advertising*, Competition & Markets Authority para 5.131 and 5.136.
[73] Smith (n 6).
[74] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* Latham & Watkins LLP paras 4.3 and 4.19.

In contrast with Facebook, GIPHY started to monetise its activity on a different market, and with a different purpose, as pointed out by the parties throughout the proceedings[75]. GIPHY's Paid Alignment Business Model was not meant to trigger actions on users but was only directed at raising brand awareness for advertisers and brands[76]. As illustrated, the purpose of advertising for Facebook and GIPHY is not the same and, in our view, they cannot amount to an overlap at the same level of the value chain of the display advertising market[77].

Bearing in mind that Facebook's acquisition of GIPHY can lessen competition within the advertising market, even in insignificant terms, the merger is pre-empted anticompetitive due to the unpredictable and dynamic characteristics of digital markets. Surprisingly, the CMA established that the merger would not raise anticompetitive concerns if GIPHY was to be acquired by a third party other than Facebook[78]. Therefore, the 'substantiveness' of the prospective risks associated to competition within the display advertising market does not stem from the merger on itself or the decisions made by Facebook once it was completed, but rather on the initial position held by the competition authority in its market study against the social network conglomerate.

3.3 The applicable test for a dynamic market by using static parameters of competition

The definitions and tests that have been applicable up until to this moment within the competition law community in relation to dynamic markets have been conflated. The difference between static and dynamic competition strives upon the nature of the rents firms compete for: in the case of static, they compete for existing rents, whereas for dynamic they do the same for future rents -produced through innovation in the long term-.

As a matter of fact, the dynamic competition paradigm only means the parameters of competition and innovation must be considered within the antitrust analysis as co-determinant of the changes produced within the market structure and the undertaking's performance within it. This paradigm enables competition authorities to observe market outcomes alternatively and cumulatively in terms of concentration and of the progress on innovation at the industrial level, and not only considering the former

[75] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* Latham & Watkins LLP para 4.1.
[76] *Completed acquisition by Facebook, Inc. of GIPHY, Inc.* Latham & Watkins LLP para 7.13.
[77] OLG Vienna 10.11.2021, 28kt 6/21y and OGH 23.06.2022, 16Ok3/22k. Both the Higher Regional Court of Vienna acting as the Federal Cartel Court as well as the Supreme Cartel Court, held the position that no significant horizontal overlap was produced, from the Austrian competition regime point of view.
[78] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA para 11.312.

in detriment of the latter as conflicting values[79]. Plain and simple, the shift from one approach to the other lies upon the assessment rendered to the same set of facts; whereas the static analysis considers each industry and firm as a black box where technology and innovation are predominantly irrelevant, dynamic analysis aims to set out the differences within managerial strategies and business capabilities[80].

It follows then that static competition analysis will consider the same set of assumptions repeatedly: if undertakings cannot be distinguished one from another from the inside, higher levels of concentration will always lead to undesirable market outcomes. When authorities act on 'blind' assumptions pursuant to the static structure-conduct-performance framework, competition policy may, as a result, also become the source of unreasonable conclusions[81].

On the contrary, through dynamic assessment, competition authorities can observe market outcomes depending on the 'mix' of competition and innovation that can be welfare-enhancing within each industry and firm: it follows that the same combination will not be optimal for digital markets as opposed to traditional markets. This approach is tailored to avoid overenforcement that can cause a diminishment of innovation as well as a decline on positive market outcomes. However, most competition authorities tend to fall in the trap that a monopolist (or a highly concentrated market, for that matter) may have low incentives to innovate. This may not be true for digital markets where venture capitalists are available, and the larger part of the main digital platforms are multiproduct firms[82].

As opposed to this, the CMA considers that Facebook aims to create an architectural advantage or bottleneck within the GIF sector. In the same spirit, Facebook would favour the extraction of naked monopoly rents once the merger was completed[83]. How-

[79] Nicolas Petit and David Teece, 'Innovating Big Tech Firms and Competition Policy: Favoring Dynamic Over Static Competition' (2021) 30(5) Industrial and Corporate Change 1170-1171; Frederic Jenny, 'Competition law and digital ecosystems: Learning to walk before we run' 30(5) Industrial and Corporate Change 1143-1167.

[80] Petit and Teece (n 80) 1992. This same understanding is not followed by the Competition Appeal Tribunal in *Meta Platforms, Inc. v. Competition and Markets Authority* [2022] CAT 26. Instead, in paras 99-102, the CAT sets out that static and dynamic competition are coexistent within the same spectrum and cannot be too rigidly demarcated. All in all, the CAT upholds the CMA's decision in substance, whereas it mildly touches upon the information subject to confidentiality and its unfolding to the parties.

[81] Joseph A. Schumpeter, *The Theory of Economic Development: An Inquiry into Profits, Capital, Credit, Interest, and the Business Cycle* (fist published 1934, Harvard Economic Studies 2008); OECD (n 71).

[82] Petit and Teece (n 79) 1175-1176; Gary Dushnitsky and D. Daniel Sokol, 'Mergers, Antitrust, and the Interplay of Entrepreneurial Activity and the Investments that Fund It' (2021) No. CLASS 21-35 USC CLASS Research Paper <https://dx.doi.org/10.2139/ssrn.3863580> accessed 4 April 2022.

[83] Michael G. Jacobides, Thorbjørn Knudsen and Mie Augier, 'Benefiting from innovation: Value creation, value appropriation and the role of industry architectures' (2006) 35(8) Research Policy 1210; Petit and

However, the competition authority fails to identify the heterogeneity and dynamic capabilities between both undertakings in terms of the differences between their business models. Although in the short-term Facebook's incentives may be driven towards a profit-maximising strategy within the range of platforms and services it owns, in the long-term digital platforms tend to prioritise their strategies on growth, expansion and scale[84].

3.4 The resulting theories of harm applied: loss of innovation (and!) of future competition

On top of that, the theory of harm applied by the CMA does not consider the 'killing' of a nascent competitor, but rather that of a monetisation strategy: the Paid Alignment Business Model. As opposed to the test applicable to the dynamic competition paradigm, the incentives of the existing competitors within the market are not analysed on the long-run but rather on the short-run.

The British competition authority pulls together the two main -and mutually exclusive- theories of harm that have been used in nascent competitor acquisition cases: the loss of future competition (for example, the *Facebook/Instagram* acquisition) and the loss of innovation between the acquirer and the target (for instance, following the *Ilumina/Grail* merger[85]). The competition authority's scrutiny from both perspectives puts forward GIPHY's monetisation strategy as the source for potential competition and as a key differentiator in terms of innovation before Facebook's superdominance on the display advertising market[86].

However, the CMA's reasoning leads us to an antitrust cul-de-sac. Either Facebook and GIPHY are so close within the market of display advertising so the loss of future competition is so imminent that the likelihood of significant future competition outweighs the benefits and synergies caused by the merger, or the undertaking's overlap within display advertising is so remote that competition would not take place until the distant future and therefore the key parameter of competition to be analysed is innovation. Anyhow, the CMA cannot have it both ways: if the loss of competition

[84] Petit and Teece (n 79) 1184.
[85] Case C-T-227/21 *Ilumina v. Commission* (General Court -Third Chamber, Extended Composition, 13 July 2022). At the jurisdictional level, the General Court confirmed the extensive interpretation of the European Commission's powers under article 22 EMUR, and established the principle of the protection of legitimate expectations would be applicable only when well-founded expectations were given as a consequence of precise assurances from an EU institution, body or agency (paras 254).
[86] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA para 7.254.

theory of harm is applicable due to the temporal proximity of competition between one and another, then the legal test required by this analysis must follow, and vice versa[87].

Either way, the CMA fails to ground its pre-emptive finding on solid arguments, since it considers a static approach to the merger: the current *status quo* of the market (or counterfactual)[88]. Although the decision is sustained on the grounds of the 'nascent' rationale, the competition authority does not factor into its analysis the uncertainty about future competition that is characteristic to dynamic markets[89]. The CMA highlighted GIPHY's revenue model was primarily flawed so that in the near future it would not have generated enough revenue to secure sufficient external investment and there was no realistic prospect of an alternative purchaser[90].

In the case of the loss of future competition theory that would have required to predict the evolution of the market of display advertising over time, with and without the merger. To this end, for instance, it did not consider GIPHY will be a significantly weaker competitor within the market of the provision of GIFs if the merger is blocked and divestiture is ordered. From the economic analysis perspective, the CMA is right to point out that expansion within the multi-sided market of advertising can be magnified by network effects, but it does not account, for instance, for the marginal cost efficiencies that would arise from the merger[91].

In the case of the loss of innovation theory, the analysis is based on the incentives and ability of the merging parties to engage in innovation which, in turn, must be corroborated by the economic analysis of innovation effects -lacking on the CMA's decision-. The application of these economic models can be presumptive to the specific assumption in which they are formulated and have posed problems for competition authorities throughout the world. Traditionally, the most suitable economic analysis has been to balance out the social costs of lost competition caused by the merger against the reduced incentives to innovation as a result of the operation, according to the EC's Guidelines on the assessment of horizontal mergers[92]. In this same spirit, some acquisitions may be more problematic than others.

[87] Jay Ezrielev, 'Uncertainty and Two Theories of Harm in Nascent Competitor Acquisitions' (2022) Competition Policy International <https://www.competitionpolicyinternational.com/uncertainty-and-two-theories-of-harm-in-nascent-competitor-acquisitions/?utm_source=CPI+Sub%E2%80%A6> accessed 23 February 2022.
[88] Salomé Cisnal de Ugarte, Mélanie Perez and Ivan Pico, 'A New Era for European Merger Control: An Increasingly Fragmented and Uncertain Regulatory Landscape' 6(1) European Competition and Regulatory Law Review 18.
[89] OECD (n 71).
[90] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA para 11.154.
[91] Ezrielev (n 87).
[92] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5.

As a matter of fact, innovation in the form of the Paid Alignment Business Model has already manifested itself on GIPHY's uprising monetisation strategy. In the same vein, GIPHY cannot be classified within the potential competition category since its monetisation business model has already realised in the market. In addition, we are a long way from the traditional pharma scenario where innovation as such must be protected so that a technological advancement is not discontinued in order to avoid a replacement effect, similar to the recent *Ilumina/Grail*[93] merger[94]. Moreover, digital markets do not follow a standardised innovation process pursuant to a regulatory approval process as opposed to the pharma industry. Thus, the quantitative evidence supporting the theory of harm of 'killing' a monetisation strategy cannot follow through on the basis of accurate prospective predictions[95].

As counterintuitive as it can sound, when there is a higher degree of alignment between the undertakings, there will be a greater scope for efficiencies to be redeemed from the merger[96]. In the terms of the General Court's ruling on *CK Telecoms UK*, any concentration can lead to efficiencies, stemming particularly from the rationalisation and integration of the undertakings following the merger[97]. However, the EC's implementation of this theory of harm has, *de facto*, reversed the burden of proof so that the undertaking is the one responsible to show these effects outweigh the potential risks of the merger. In fact, in those cases the EC would have accepted efficiency claims, it did not verify them because the parties did not achieve to bring them forward successfully. On top of that, even in those mergers where efficiency claims were considered, they were not decisive or indicative of the EC's final decision[98].

[93] European Commission, 'Mergers: Commission opens in-depth investigation into proposed acquisition of GRAIL by Ilumina' (*Press Corner*, 22 July 2021) <https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3844> accessed 9 March 2022.

[94] Colleen Cunningham, Florian Ederer and Song Ma, 'Killer Acquisitions' (2018) 129(3) Journal of Political Economy 649-702.

[95] Norbert Maier and Kalle Kantanen, 'Economics of Potential Competition' (*CPI Competition Policy*, 10 February 2022) <https://www.competitionpolicyinternational.com/economics-of-potential-competition/?utm_source=CPI+Subscribers&utm_campaign=c6c858cf3e-%E2%80%A61/11> accessed 15 March 2022; Christopher P. Adams and Van V. Brantner, 'Estimating The Cost of New Drug Development: Is It Really $802 Million?' (2006) 25(2) Global Health Priorities; Pierre Dubois, Olivier de Mouzon, Fiona Scott-Morton, and Paul Seabright, 'Market size and pharmaceutical innovation' 46(4) The RAND Journal of Economics.

[96] Petit and Teece (n 79) 1187; Geoffrey Parker, Georgios Petropoulos and Marshall Van Alstyne, 'Platform mergers and antitrust' (2021) 30(5) Industrial and Corporate Change 1308; Jan Bena and Kai Li, 'Corporate Innovations and Mergers and Acquisitions' (2013) 69(5) The Journal of Finance 1923; Kevin Bryan and Erik Hovenkamp, 'Antitrust Limits on Startup Acquisitions' (2020) 56 Review of Industrial Organization 615; Yasser Alhenawi and Sudha Krishnaswami, 'Long-term impact of merger synergies on performance and value' (2015) 58 The Quarterly Review of Economics and Finance 93.

[97] Case T- 399/16 *CK Telecoms UK Investments Ltd v European Commission* [2020] paras 276-279.

[98] Reinhilde Veugelers, 'Innovation in EU merger control: walking the talk' (2012) Bruegel Policy Contribution Issue 2012/04, <https://www.bruegel.org/wp-content/uploads/imported/publications/pc_2012_04__FINAL.pdf> accessed 4 April 2022.

Considering the case of the Facebook/GIPHY merger, the social costs of lost competition might be lower than the reduced incentives to innovation. However, stemming from the conclusions of its market study, the CMA already deemed that Facebook's dominance was inadmissible and potentially harmful for competition on its own, through the abuse of a dominant position lens under article 102 of the Treaty of the Functioning of the European Union. The structural remedy ordered by the decision has been the device picked out from the toolbox by the authority to confront Meta's dominance within the UK.

3.5 Vertical effects: GIFs as an input to foreclose

Following its position from the horizontal viewpoint, the CMA also established that GIFs are an input in the downstream market of the provision of GIFs. All in all, it stated that Facebook will foreclose the access to the input or downgrade the conditions in which it is rendered to GIPHY's API existing partners.

By this token, the competition authority believes Facebook would be incentivised to disadvantage its competitors on the upstream market of social media by limiting the access to GIPHY's features, similar to the effects caused by mergers involving pipeline firms[99]. These concerns are similar to those voiced out by EC on the *Google/Fitbit* merger, although the conclusions derived from it are striking by comparison[100]. As we have shown before when analysing Facebook's main sources of revenue, a major part of its value is not derived from within the social network, but instead depends on the value created by third parties through display advertising[101]. However, the competition authority's main argument to uphold Facebook's incentives to foreclose is addressed through the balance of the direct benefits and the costs associated to this strategy. The fact that users tend to multi-home across platforms is not an obstacle to this finding[102].

Against the backdrop of dynamic digital markets, the competition authority acknowledges that the vertical effects of the merger take place within an evolving innovation and experimentation-prone environment, where the static economic analysis is not applicable[103]. On the basis of the foregoing, if the CMA's rationale was to be consistent, if the economic analysis performed for the horizontal overlaps is static,

[99] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA para 8.165; Parker, Petropoulos, and Van Alstyne (n 97) 1308; at the EU level, in cases such as Case. M. 8955 *Takeda/Shire* [2018], Case. M. 8084 *Bayer/Monsanto* [2018] and Case M. 7932 *Dow/DuPont* [2017].
[100] Malte Frank and Sabrine Frank, 'Google/Fitbit: the starting point for a revolution in merger remedies in digital markets?' (2021) 42(6) European Competition Law Review 297-298.
[101] Geoffrey Parker, Marshall Van Alstyne and Xiaoyue Jiang, 'Platform Ecosystems: How Developers Invert the Firm' (2017) 41(1) MIS Quarterly 255-266.
[102] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA paras 8.120-8.126.
[103] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA para 8-146.c).

the same must be applicable for the vertical perspective. It does not follow that the dynamic competition paradigm justifies the competition authority's intervention if it works on the assumption that digital markets compete for rents and not for users[104]. Considering Facebook's large user base, the authority considers the direct benefits of foreclosure would be larger than its incentives to keep from restricting access to GIPHY as an input, although in a public statement it declared that it would maintain existing relations and conditions with API partners. Facebook even signed a 5-year agreement with Snap to ensure access on the same terms to the GIF library and database[105].

In the CMA's opinion, GIPHY is attributed the role of a 'complementor' within Meta's ecosystem, so that the merger is subservient to break the barrier on the provision of GIFs and then Facebook can follow through insulating the barrier to protect its own superdominant position within social media and digital display advertising[106]. Again, the authority's argument is completed through the pre-emptive conclusions obtained from the market study performed on digital platforms to establish a substantive lessening of competition due to input foreclosure. This conclusion is similar to the ACCC's conclusion on the *Google/Fitbit* merger[107].

All in all, the decision to order the divestiture is a clear example of a Type I error on competition enforcement, which deprives the market of attaining the efficiencies associated with the merger[108].

4 Interoperability solutions as opposed to structural remedies

In line with its opinion throughout the proceedings, the CMA required the full divestiture of GIPHY from Facebook[109]. On top of that, considering GIPHY's financial (questionable) viability, the competition authority deemed that a simple divestiture over the target was not enough: Facebook had to restore GIPHY's ability to generate revenue, so that the remedies comprised additional obligations in terms of time and

[104] Ezrielev (n 87); Petit and Teece (n 79) 1191; Marco Cappai and Giuseppe Colangelo, 'Navigating the Platform Age: the 'More Regulatory Approach' to Antitrust Law in the EU and the US' (2020) TTLF Working Papers, No. 55, <https://www-cdn.law.stanford.edu/wp-content/uploads/2020/04/cappai_colangelo_wp55.pdf> accessed 2 June 2022.

[105] Vishal Shah, 'Facebook Welcomes GIPHY as Part of Instagram Team' (*Meta*, 15 May 2020) <https://about.fb.com/news/2020/05/welcome-GIPHY/> accessed 8 February 2022; *Completed acquisition by Facebook, Inc. of GIPHY, Inc.* Latham & Watkins LLP para 8.2

[106] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA paras 7.240 and 7.241; Petit and Teece (n 79) 1191.

[107] Frank and Frank (n 100) 299.

[108] Ariel Ezrachi, 'Under (and Over) Prescribing of Behavioural Remedies' (2006) Working Paper 13/05, The University of Oxford Centre for Competition Law and Policy, <https://dx.doi.org/10.2139/ssrn.913773> accessed 4 April 2022.

[109] *Completed acquisition by Facebook, Inc. of GIPHY, Inc.* Notice of possible remedies under Rule 12 of the CMA's rules of procedure for merger, market and special reference groups para 11.

resources from Facebook. Within the divestiture rationale, given that Facebook has terminated the Paid Alignment Business Model, i.e., its revenue function, it should make up for it. The UK competition authority goes through with this process and imposes far-reaching obligations on Facebook as part of its divestiture package, such as imposing that a strong and experienced senior management team must be provided and cash to support its operating activities must be incorporated, amongst others. Not only the CMA looks to reverse the situation generated by the merger, but it looks to reinstate GIPHY as a viable and strong competitor within the market, although its pre-merger prospects were not positive[110].

Stemming from the ideas underlying the theories of harm on the lessening of competition and innovation caused by the merger, the CMA rules out the effectiveness of behavioural remedies due to their static nature. The competition authority establishes that behavioural remedies are only suitable when divestiture is not a feasible option, and the substantive lessening of competition will have its effect during a short period of time[111]. This would be a coherent approach if the competition authority would have followed the spirit as well as the legal and economic tests applicable to dynamic theories of harm from the horizontal and vertical viewpoint[112]. However, as shown above, it failed to do so.

Aside from this, it follows that if the concerns voiced out by the competition authority are dynamic in nature, the remedies brought out to address them must be the same, although they might be costly because of the resources required for monitoring compliance from a public enforcement perspective[113]. In this same vein, behavioural remedies are flexible and reversible tools that are suitable to address concerns in markets with changing realities, as opposed to the irreversible component of structural remedies[114].

In front of the competition authority's pre-emptive decision, Facebook put forward the whole set of interoperability remedies that have been used and proposed by competition authorities: i) protocol interoperability (the 'commingling' remedy); ii) data interoperability (the 'open access' remedy); and iii) full protocol interoperability (the

[110] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA paras 11.14-11.21 and 11.49.
[111] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA paras 11.251 and 11.253.
[112] Rory Van Loo, 'In Defense of Breakups: Administering a "Radical" Remedy' (2020) 105(7) Cornell Law Review 1955.
[113] *Completed acquisition by Facebook, Inc. of GIPHY, Inc.* Notice of possible remedies under Rule 12 of the CMA's rules of procedure for merger, market and special reference groups para 10.
[114] Ezrachi (n 109); Frank P Maier Rigaud, 'Behavioural versus Structural Remedies in EU Competition Law' in Philip Lowe, Mel marquis and Giorgio Monti (eds), *European Competition Law Annual 2013* (Hart Publishing 2014).

white label licensing remedy)[115]. All of them were ruled out due to their behavioural nature, regardless of the effects they could comprise for competition within the merger. Accordingly, we must question whether interoperability mandates are dynamic in nature and suitable to address competition concerns within digital markets.

4.1 An overview on interoperability

The break-up ordered by the CMA, especially when the operation was non-notifiable under the U.S. merger regime, calls for a closer look into alternative outcomes and remedies that could have been imposed, namely interoperability mandates. Interoperability refers to the ability of different services, i.e., Facebook and its competitor's services, to communicate and work with one another, given that the latter is complementary to the former's functionalities. This remedy can have both horizontal and vertical implications[116].

Bearing in mind the acquisition cannot be labelled under the 'killer acquisition' category, divestiture seems to be a burdensome solution[117]. Instead, when anti-competitive leveraging of market power into markets with complementary services is involved, data interoperability may be an efficient possibility to apply to the merger, so synergies resulting from the operation can be reflected immediately into the market and the risks posed by it can be addressed in an effective manner[118].

Not only that, but interoperability mandates are adequate instruments to face heterogeneous market realities[119]. Considering the Facebook/GIPHY merger, which the CMA claimed jurisdiction over -the Australian authority's decision is still pending and the Austrian Supreme Cartel Court has already cleared the merger with commitments- although both undertakings are established in the U.S., divestiture can cause unpredictable outcomes worldwide. We can agree that, once the divestiture is completed according to the CMA's conditions, its effects will not be confined to the UK market, but to a global scale, insofar as the requirements stated by the authority have a worldwide dimension to them. For instance, they are aimed at restoring GIPHY's necessary management, technical and creative personnel to enable it to compete effectively after the divestiture is completed.

[115] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA paras 11.204-11.217; *Competition Policy for the digital era: Final report* Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 63.
[116] Chris Riley, 'Unpacking interoperability in competition' (2020) 5(1) Journal of Cyber Policy 95.
[117] Examples of non-divestiture remedies in the EU, i.e., Case M. 8330 *Maersk Line/Hamburg Süd* [2017] or Case M. 7268 *CSAV/HGV/Kühne/Hapag Lloyd* [2014].
[118] Crémer, de Montjoye and Schweitzer (n 115) 130.
[119] Ezrachi (n 108); for instance, Case. M.8314 *Broadcom/Brocade Regulation* [2017] or Case M. 8744 *Daimler/BMW/Car Sharing JV* [2018].

Even though the theories of harm designed by the CMA looked to address horizontal and vertical effects, one of the main risks associated to the merger manifests on Facebook's incentives to disadvantage its competitors in terms of the provision of GIFs on the vertical front as well as to aggregate GIPHY's data into its own datasets to generate more insights and unwarranted economic value for its behavioural and targeted advertising tasks performed on neighbouring markets[120]. The main risk at stake is that of asymmetry of information between competitors, not as a result of competition on the merits, but as the product of an acquisition of a close substitute.

In the face of this, interoperability mandates can address these concerns, and the technical means to manage them are public, transparent, third-party facing APIs, where users and third-party service providers can meet up so GIPHY's library and search engine is no longer non-exclusive and non-rivalrous to Facebook, and can be accessible to partners, but also to users that can generate content through GIFs[121]. In fact, at the Austrian level, this condition was imposed by the legal authorities to counteract the possible consequences caused by the merger[122]. This type of APIs, as opposed to private APIs, establish mechanisms so that remote services can require data or an operation to be performed by the platform, and it can get as basic or as complex as the remedy's scope of action[123]. Therefore, GIPHY's library could be made available for competitors and final consumers to generate content and value by unlocking downstream innovation. Nonetheless, if access is not rendered to real-time data streams, the remedy may render ineffective altogether[124].

The main drawback to these remedies follows the gatekeeper philosophy: if the API is embedded within Facebook's ecosystem, it can decide which requests (from its competitors) are to be accepted and denied based on its technical and usage policies. Therefore, the question of foreclosure becomes more of a circular conundrum in this context: Facebook is the only one holding the master keys to the APIs, and it is the only

[120] Parker, Petropoulos, and Van Alstyne (n 96) 1309; Bertin Martens, 'Data Access, Consumer Interests and Social Welfare: An Economic Perspective' (2020), <https://dx.doi.org/10.2139/ssrn.3605383> accessed 4 April 2022.
[121] Riley (n 116) 96.
[122] The Federal Court ordered, after all Austrian and international merger proceedings would be completed, that Meta would have to grant alternative GIF libraries, under certain conditions, access via APIs to Giphy's GIF Library to allow the establishment of an additional GIF provider other than Giphy and Tenor (Google) for a 7-year period of time; 'Meta(Facebook)/Giphy merger: AFCA appealing against conditional clearance' (*Federal Competition Authority*, 4 March 2022) <https://www.bwb.gv.at/en/news/detail/meta-facebook-giphy-merger-afca-appealing-against-conditional-clearance> accessed 15 July 2022.
[123] Michael Bock, 'WTF is an API? How the Internet Works Behind the Scenes' (*hackernoon*, 20 January 2015) <https://hackernoon.com/apis-how-the-internet-works-behind-the-scenes-690288634c32> accessed 14 March 2022.
[124] Amelia Fletcher, 'Digital competition policy: Are ecosystems different?' (2020) DAF/COMPT/WD (2020)96 Hearing on Competition Economics of Digital Ecosystems.

player capable of controlling and monitoring its actions in a successful and accurate manner[125]. This unlimited control over the API can trigger anticompetitive behaviour[126]. Additionally, Facebook will be able to closely monitor the activities of its competitors when access is rendered to them and easily replicate or answer to competitive threats[127].

All things considered, the CMA's position to rule out behavioural interoperability remedies does not seem to be proportionate, considering the impact of divestiture at a global scale, although these remedies, if not designed and closely monitored, can result to be problematic.

4.2 What's next?

Considering the drawbacks of interoperability mandates, one must question whether another course of action is possible: other than imposing obligations on the undertakings to secure the outcome of a particular merger, competition authorities can take an active role on ensuring that behavioural remedies are suited to meet the problems identified within its analysis. For instance, the faults of dynamic analysis within merger control could be addressed through merger analysis that does capture the real impact of acquisitions within digital markets.

On one hand, substitutability should be solved based on potential competition materialising within the markets concerned. Although merger control is prospective, it cannot go so far as establishing that close substitutes can account for a horizontal overlap when a dynamic markets' approach is not applied around substitutability[128]. It is possible that two close substitutes can rapidly compete and there is also a chance they never meet up on the market. Prospective analysis does not work on the assumption of the worst possible scenario, but it does function on the most probable one. For instance, online choice experiments can be performed by competition authorities in order to

[125] Joseph L. Bower and Clayton M. Christensen, 'Disruptive Technologies: Catching the Wave' (*Harvard Business Review*, January-February 1995) <https://hbr.org/1995/01/disruptive-technologies-catching-the-wave> accessed 14 March 2022.

[126] Annie Njanja, 'Meta faces prosecution in South Africa for alleged antitrust breach' (*techcrunch*, 15 March 2022) <https://techcrunch.com/2022/03/15/meta-faces-prosecution-in-south-africa-for-alleged-antitrust-breach/> accessed 15 March 2022; 'A552 – Italian Competition Authority, investigation opened against Google for abuse of dominant position in data portability' (Autorità Garante della Concorrenza e del Mercato, 14 July 2022) <https://en.agcm.it/en/media/press-releases/2022/7/A552> accessed 15 July 2022.

[127] Gabriel Nicholas and Michael Weinberg, 'Data Portability and Platform Competition: Is User Data Exported from Facebook Actually Useful to Competitors?' (2019) NYU School of Law, <https://www.law.nyu.edu/centers/engelberg/pubs/2019-11-06-Data-Portability-And-Platform-Competition> accessed 4 April 2022.

[128] Parker, Petropoulos and Van Alstyne (n 96) 1332.

capture user preferences to evaluate whether substitution is prone to manifest close in time[129].

On the other hand, dynamic efficiency gains and synergies resulting from the operation should be compared with increased concentration competition concerns, directly by the competition authority and not as a result of a reverse burden of proof in the hands of the undertakings. Therefore, network effects and data synergies of the merged entity should account for the unpredictable outcome of the merger. Competition authorities should remain open to rule that an acquisition will eliminate duplication on investment and trigger business capabilities, whereas the innovation efficiencies are factored into the 'mix' of the prospective merger market outcomes[130].

In addition, although ex ante evaluation is core to secure disruptive effects to take place within digital markets, ex post evaluation as a form of considering the effectiveness of the analysis performed and the remedies proposed is also key to ensure competition authorities can assess where they have gone wrong or, to the contrary, whether the analysis and remedies have brought the risks posed by the merger to an end[131].

Finally, the traditional approach to interoperability and data sharing has been to award it on the basis of exceptional circumstances and always referred to data of dominant firms' processes and structures, such as in the *Magill, IMS* and *Microsoft* mergers[132]. Nonetheless, competition authorities and entities must strive to ensure data interoperability is not ordered as a standalone measure but alongside data portability mandates that confer users control over their raw data. By this token, they can trigger the entrance of third parties to compete with the ecosystem holders managing the public APIs. As opposed to the risks posed by asymmetrical information in the hands of digital platforms and competitors as well as potential entrants to the market, in the sense of the Digital Act proposed in February 2022, the playing field will be progressively levelled so competitors get symmetric access to information leading to the creation of value both in the upstream and downstream market[133]. However, we must consider

[129] Erik Brynjolfsson, Avinash Collis, Walter Diewert, Felix Eggers and Kevin Fox, 'GDP-B: Accounting for the Value of New and Free Goods in the Digital Economy' (2019) 25695 NBER Working Paper Series, <https://www.nber.org/system/files/working_papers/w25695/w25695.pdf> accessed 4 April 2022.
[130] Parker, Petropoulos and Van Alstyne (n 96) 1332-1333; Veugelers (n 99).
[131] Parker, Petropoulos and Van Alstyne (n 96) 1333; Maurice E. Stucke and Allen P. Grunes, *Big Data and Competition Policy* (1st edn, OUP 2016).
[132] Joined cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities* [1995] ECR I-743; Case C-418/01 *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG* [2004] ECR I-5039; and Case T-201/04 *Microsoft Corp. v Commission of the European Communities* [2007] ECR II-3601.
[133] Parker, Petropoulos and Van Alstyne (n 96) 1325; European Commission, 'Data Act: Commission proposes measures for a fair and innovative data economy' (*Press Corner,* 23 February 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1113> accessed 21 March 2022.

more data are not always better for competitors. Rather, differentiated data from the one integrated within its own datasets are the most valuable, so interoperability mandates can range on their impact depending on existing datasets which, in turn, rely on big investment and the requirements tailored to the firm's processes. Even if close substitutes for Facebook's provision of GIFs could benefit from interoperability, the data they can obtain from the remedy could be valuable for them or not[134].

All things considered, interoperability can trigger and foster innovation and competition, but it is not a magic bullet to address competition concerns in digital markets by default. Competition authorities must delve into the dynamic competition paradigm so that efficiencies and business capabilities are accounted for, as opposed to the prospective risks caused to competition. To this end, the prospective nature of the merger control regime must not be conflated with a worst-case scenario analysis.

5 Conclusions

The CMA ordered Facebook's divestiture of GIPHY, although the substantial lessening of competition from both the horizontal and vertical perspective is questionable, considering the arguments put forward by the authority, namely the dynamic component of the merger.

First, the horizontal overlap between Facebook and GIPHY is established on the basis of their close substitutability on the display advertising market. However, the CMA fails to account that both of them could intersect in this market, but they pursue different purposes through advertising: whereas branded GIFs and GIF stickers produce user engagement and brand awareness with the advertiser's offerings, the ads displayed on Facebook are aimed to trigger an action on the user. Against this same background, the authority completes its argument, and the risks associated to competition as a result of the merger at the horizontal level, by bringing about the decisive element of digital markets: the dynamic competition paradigm. Nonetheless, the authority's analysis does not follow through on its promise: it instrumentalises the counterfactual -a static dimension of competition- to establish the imminent loss of competition and innovation to be produced on the market. On top of that, the aforementioned theories of harm are cumulatively presented by the authority to reinforce the idea of the prospective risks linked to GIPHY's elimination from the market when they, in fact, present conflicting elements which cannot go hand in hand, such as the expected proximity and time in which competition will materialise within the market. All in all, the factors contributing to the finding of Facebook's discontinuing of GIPHY's Paid

[134] Thibault Schrepel, 'Alternatives to Data Sharing' (*The Regulatory Review*, 21 February 2022) <https://www.theregreview.org/2022/02/21/schrepel-alternatives-data-sharing/> accessed 15 March 2022.

Alignment Business Model does not unravel the 'killing' of a nascent and potential competitor, although the competition authority was inclined to hold that view.

Second, the vertical overlap between Facebook and GIPHY and the threat to competition of the merger was defined in the terms of a traditional pipeline vertical merger: there is an input, and the dominant firm will be incentivised to foreclose access to it or, at least, to downgrade the conditions in which access is rendered. The same rationale of dynamic digital markets was applied and, yet again, the CMA failed to establish possible prospective states of being that could have favoured business capabilities and efficiencies for the undertakings. Furthermore, the authority places the substantial lessening of competition meter too high stemming from Facebook's initial super dominance, and the potential implications of the merger constitute the straw that broke the camel's back.

As a consequence of its horizontal and vertical findings, the authority believes remedies behavioural in nature are to be ruled out altogether, insofar as they cannot successfully and effectively address the 'dynamic' concerns of the acquisition. Nonetheless, there are in fact all kinds of reasons to advise against this position: divestiture will cause an irreversible impact on a non-notifiable operation under the UK merger regime (and for the U.S. merger control regime) and cannot adjust to the heterogeneous and uncertain market outcomes resulting from it.

As opposed to this, interoperability mandates ordered through the access of public APIs seem to be a plausible solution so asymmetries of information between Facebook and its competitors on the upstream market of the provision of GIFs can be solved. Be that as it may, interoperability is not a magic bullet to fire antitrust problems away: data can be as useful or as useless to competitors only in the light of the scope and reach of their own datasets, and therefore may need to be ordered alongside with a data portability mechanism to ensure users to port their raw data into third-party provider services.

Out of the regulatory scope, we also propose competition analysis must be enhanced so dynamic and innovation efficiencies do not come as an exception, but rather as a rule. Compared to this position, although the EC acknowledges on its Guidelines on Horizontal Guidelines the possible impact on its analysis of these elements, it has failed to consider them as an element of their merger analysis. Instead, innovation efficiencies based on the dynamic competition paradigm only play a role on merger control where the parties' standard of proof is concerned, and it has never substantially impacted on the outcome of an EC decision. To this end, competition authorities must look back at the enforcement they have performed and account for Type I and Type II errors that were committed in the past. By this token, the dynamic competition

paradigm will be progressively applied with successful outcomes, even when interoperability mandates are applied.