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Meta lodges appeal against CMA's order to divest Giphy

On 23 December 2021 Meta Platforms, Inc (formerly Facebook, Inc) challenged the Competition and Markets Authority's (CMA) decision ordering the divestment of Giphy, which Meta had acquired in May 2020. A summary of the application was published on 5 January 2022.

BACKGROUND

On 15 May 2020 Facebook announced that it had acquired Giphy, an online search engine that allows users to share GIFs - digital files displaying a short, looping, soundless video.

In June 2020 the CMA notified Facebook of its intention to investigate the transaction, and after an in-depth investigation, it issued its final report on 30 November 2021 ordering Meta to divest Giphy. In line with its provisional findings, the CMA concluded that Meta's ownership of Giphy had resulted or may be expected to result in a substantial lessening of competition in (i) the supply of display advertising in the UK, and (ii) the supply of social media services worldwide (including in the UK).

With regards to the supply of advertising services, the CMA found that Giphy's advertising services had the potential to compete with Meta's own advertising services.

With regards to the supply of social media services worldwide (including in the UK), the CMA concluded that Meta would be able to increase its market position by denying or limiting other platforms' access to Giphy GIFs, driving more traffic to Meta-owned sites, including Facebook, WhatsApp and Instagram.

After consulting on potential remedies, the CMA concluded that only the sale of Giphy by Meta to an approved buyer could address its concerns.

THE APPEAL

On 23 December 2021 Meta filed an application with the Competition Appeal Tribunal (CAT) appealing the CMA's decision. It is bringing the appeal on six grounds:

- **No finding that Giphy would have become a meaningful competitor** - In respect of the CMA's finding that the merger would harm competition in the supply of display advertising in the UK, Meta considers that the CMA did not find that Giphy would have become a meaningful competitor to Facebook on any UK advertising market in the future. Meta claims the CMA instead sought to rely on a concept of "*dynamic competition*", without assessing whether Giphy would have become a significant competitive threat on a relevant UK advertising market or whether Meta would have responded accordingly.
- **Contradictory findings** - Meta argues that the CMA's findings in respect of competition in the supply of display advertising in the UK are inconsistent with its findings in relation to market definition and Meta's market power.

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- **Irrational counterfactual** - Meta argues that the CMA's counterfactual does not rationally follow from the facts, and that in reaching its view on the counterfactual the CMA has ignored relevant information.
- **Procedural flaws** - Meta claims that the CMA's decision contains procedural flaws, including that the CMA acted unfairly in its disclosure and consideration of material information. It also argues that the CMA failed to make inquiries which a reasonable authority would have made, and that the extensive redactions in the decision amount to an unlawful failure to give reasons.
- **Assessment of remedies** - Meta argues that the CMA failed to assess in isolation the remedy it would have imposed to address concerns relating to the supply of social media services and, further, it failed to assess any option beyond divesting Giphy. Given the flaws in the CMA's findings with respect to competition in the supply of display advertising, Meta argues there is no basis for maintaining the divestment remedy.
- **Disproportionate remedy** - Meta claims that the CMA acted irrationally and disproportionately when imposing the remedy by requiring that any purchaser must show a commitment to providing GIF-based advertising in the UK and that Meta must provide Giphy with a cash sum and a GIF supply agreement.

Meta is asking the CAT to quash the CMA's decision in its entirety, or alternatively to the extent necessary to remedy the CMA's errors of law.

NEXT STEPS

The CAT has granted the CMA an extension until 30 January 2022 to file its defence. Many will be watching as the CMA seeks to defend its first Big Tech prohibition.

OTHER DEVELOPMENTS

ANTITRUST

FCA TO LAUNCH TWO MARKET STUDIES TO INVESTIGATE COMPETITION CONCERNS IN WHOLESALE DATA MARKETS

On 11 January 2022 the UK's Financial Conduct Authority (FCA) announced its plans to launch two market studies as part of a larger information gathering exercise on access to and use of wholesale financial data. The announcement follows the publication of the feedback from the FCA's Call for Input of March 2020, which indicated that the markets for trading data and benchmark provision may not be working effectively and identified concerns around the supply of market data, together resulting in increased costs and limited choices for investors.

The responses to the Call for Input resulted in the FCA deciding that the markets for trading data, benchmarks (namely financial indices), and market data (including credit ratings) warranted further analysis to ensure that the markets are functioning competitively and in the interests of users. As recognised by Sheldon Mills, Executive Director of Consumers and Competition at the FCA: "*Access to wholesale data is really important for those who want to make investment decisions. Without it, they lack the information they need to make properly informed choices*".

In a first market study to be launched this summer, the FCA will focus on benchmarks, specifically whether complex contracts prevent market participants such as asset managers and banks (using benchmarks and indices to track and evaluate asset prices and investment performance) from switching to cheaper, higher quality or more innovative alternative providers. In a second market study, to be launched by the end of 2022, the FCA will assess whether high charges for access to credit ratings data are increasing costs for investors and limiting new market entrants. For each market study, further information including an anticipated timetable will be published later this year.

The FCA further announced that trading data will be the focus of further research this spring and that its future research will include alternative data and advanced analytics, which are increasingly being used by market participants. According to Sheldon Mills, the "*planned market studies are intended to ensure that competition is working well, that information is available to market participants that want it, and that innovation is keeping up with market developments*".

CMA SECURES DISQUALIFICATION OF CARTEL PHARMA DIRECTOR

On 11 January 2022 the CMA announced that it had secured the disqualification of Pritesh Sonpal, a former director of pharmaceutical wholesaler, Lexon, as a director of any UK company. Sonpal's disqualification undertaking began on 12 January 2022 and will run for a four year period.

The disqualification follows the CAT's rejection in February 2021 of Lexon's appeal against the CMA's decision of March 2020 to fine the company £1.2 million for illegally sharing commercially sensitive information with two competitors regarding the supply to the UK's National Health Service of antidepressant nortriptyline.

This marks the fourth disqualification relating to this investigation. Lexon's competitors, King Pharmaceuticals and Alissa Healthcare research, admitted to illegal conduct at the time of the CMA's decision, resulting in fines of £75,573 and £174,912, respectively, whilst Lexon refused to settle. The CMA also secured disqualification undertakings from Phillip Harwood of King and Robin Davies of Alissa for seven and two years, respectively (the latter disqualification being suspended for two years on the basis that Davies, as sole executive director, was irreplaceable). The investigation also resulted in a second decision against King and its competitor, Auden McKenzie, resulting in further fines and the disqualification of Auden's director, Amit Patel, for five years.

The disqualification of Sonpal shows the CMA's persistence in such cases, with Michael Grenfell, Executive Director of Enforcement at the CMA saying, *"These actions are unacceptable. We will continue to crack down on law-breaking companies and directors to protect vulnerable patients, the NHS and taxpayers"*.

This disqualification is one of an increasing number successfully sought by the CMA across business sectors. Since 2003, when the CMA was granted the power to apply for director disqualification, until the end of 2018 the CMA had secured only four director disqualifications. However, in February 2019 it announced that it was "*ramping up how [it uses] disqualification powers and as a result, the risk of director disqualification to those who break the law has never been higher*". Since 2019 the CMA has successfully sought disqualification of a further 21 directors. In the press announcement, Grenfell made it clear that this latest case *"should be a message to all directors – if your company breaches competition law, you risk personal disqualification"*.

GENERAL COMPETITION

CHINA RELEASES RULES FOR ALGORITHMS FOR ONLINE RECOMMENDATIONS SERVICES

On 4 January 2022 China announced the release of the Provisions on the Administration of Internet Information Service Algorithm Recommendation (the Provisions), which will take effect from 1 March 2022. The Provisions will apply to algorithm recommendation technology which provides internet information services within China and will prohibit service providers from using algorithms to influence online public opinion, engage in monopolistic conduct or otherwise compete unfairly. Providers must also publish the basic principles, purpose and operating mechanism of their service and must also allow users to opt out of services being customised according to their personal characteristics or to disable the algorithm recommendation service altogether.

Providers are banned from using algorithms to unreasonably apply different terms to similar transactions through analysis of consumers' preferences or transaction history. The Provisions also regulate the provision of algorithm recommendation services to users such as minors, seniors, workers and consumers, introducing, for example, a ban on providing information to minors that might impact their physical or psychological health.

Businesses can be fined from RMB 10,000 up to RMB 100,000 (approximately £1,200 to £12,000) for violations of the Provisions.

The release of the Provisions comes after a one-month public consultation by the Cyberspace Administration of China which started in August 2021 (for further details, see our September newsletter).

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