



The ACCC's Facebook/Giphy Merger Inquiry: CCIA's Comments Responding to the Public Consultation

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1. Introduction

The Computer and Communications Industry Association (“CCIA”) is grateful for the opportunity to share its views on the Australian Competition & Consumers Commission (“ACCC”) consultation regarding Facebook’s acquisition of Giphy through Facebook’s subsidiary Tabby (“the Transaction”).¹

CCIA represents large, medium, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services. Our members employ more than 750,000 workers and generate annual revenues in excess of \$540 billion.

To ensure that tech-related innovation continues to play a positive role in the global economy, both sound competition policy and antitrust enforcement must play a crucial role in protecting competition across markets. Merger control, as part of the antitrust toolkit, remains a key element in maintaining a dynamic economy. To that end, competition authorities have applied merger control rules vigorously in recent years, and the ACCC represents no exception to this trend.²

¹ See the ACCC’s public consultation announcement in the following link
<https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/facebook-completed-acquisition-of-giphy-inc>

² For information relating to the ACCC’s merger control activity please see:
<https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews>.



CCIA supports vigorous antitrust enforcement and understands that merger control frameworks are essential to ensure that market competition functions to the benefit of consumers. By the same token, in line with the work that the ACCC has traditionally advanced in the area of merger review, CCIA believes that maintaining a merger control regime that encourages investment and facilitates market-exit when competition is not substantially lessened helps promote economic growth through competition by promoting and facilitating new investments and market entry.

To strike the right balance between scrutinizing transactions without disincentivizing investments CCIA understands that merger review and retrospective analysis must be evidence-based and take into account legal and economic analysis that accurately portray the relevant market dynamics. By conducting evidence-based analysis, the ACCC ensures that due process rights and fairness principles in line with best international practices are respected. CCIA's comments are herewith submitted with this principle's approach to antitrust enforcement and merger review processes in mind.

CCIA contends that based upon publicly available information, the Transaction would not be expected to result in a substantial lessening of competition to the detriment of customers. CCIA understands that the Transaction represents a vertical integration as neither the acquirer nor acquired currently compete against each other or plan to do so. As discussed further below, it is generally accepted that this type of vertical transaction brings about synergies and efficiencies that enhance the welfare of consumers and positively benefit competition.

Despite the Transaction not being expected to have an impact on competition, CCIA believes that when the technology and design features permit, it is desirable to promote open markets, interoperability, and the possibility to integrate services in multiple platforms. CCIA understands that Facebook intends to maintain the multi-platform integration of Giphy services that currently exists and in CCIA's view this would result in positive benefits for consumers.



The remainder of this submission is organized in four sections that discuss, namely: (i) vertical mergers; (ii) market dynamism; (iii) the role of commitments; and (iv) concluding remarks. The analysis provided in these sections suggests that consumers would benefit from the Transaction, and therefore it should not be opposed.

2. Vertical Mergers

For years, competition agencies have been correct to recognize that vertical mergers are typically procompetitive in nature and require a different approach when enforcing antitrust. Vertical mergers usually bring about substantive pro-consumer efficiencies.

The ACCC's Merger Control Guidelines as updated as a result of the 2017 Harper reforms to the Competition and Consumer Act 2010 (the "Merger Guidelines") acknowledge the presumptive neutrality of vertical mergers in paragraph 5.4 by stating that "*Although horizontal, vertical and conglomerate mergers can all potentially give rise to unilateral effects, it is recognised that vertical and conglomerate mergers are generally less likely than horizontal mergers to raise competition concerns.*"³ Furthermore, the Merger Guidelines clearly state that "*In the majority of cases, non-horizontal mergers will raise no competition concerns*".⁴ The Merger Guidelines explain that the reason for prohibiting vertical transactions that give rise to a Substantial Lessening of Competition ("SLC") is that "*the merged firm has the ability and incentive to use its position in one market to anti-competitively foreclose rivals in another market in a way that lessens competition.*"⁵

As discussed further below, when describing the market dynamics, CCIA understands that after the proposed Transaction is completed, competition will remain as intense as prior to the merger,

³ The ACCC's Merger Control Guidelines as amended in 2017 are available at:

<https://www.accc.gov.au/system/files/Merger%20guidelines%20-%20Final.PDF>, at 5.4.

⁴ *Id.* at 5.21

⁵ *Id.* at 5.22



because there will be no changes in the different market structures where the parties to the Transaction operate. In fact, because Facebook and Giphy do not compete against each other, the outcome of the Transaction will only bring positive outcomes for consumers.

Based upon publicly available information, it is expected that the Transaction will allow the parties to combine the talent from their different work forces. As a result, one may expect new ideas, improved services, and better products to be introduced in the markets.

The market dynamics as described in the following section show that as a result of the merger, competitors will not be deterred from innovating, entering, or expanding the markets. Furthermore, taking into account that the market players will remain the same, there will be no incentives for market players to pass on higher prices to consumers, reduce quality, or otherwise compete less aggressively against each other. In fact, the merged firm will not foreclose the market, or raise rivals' costs. On the contrary, the Transaction will enhance market competition, especially through the combination of human capital, and investments that Facebook is likely to make in Giphy to provide customers with even more innovative products and services.

Therefore, it seems reasonable to conclude that the acquisition of Giphy by Facebook falls under the classic vertical merger that by all means will inject innovation and even more dynamism in the markets to the ultimate benefit of consumers.

3. Market Dynamics Evidence Intense Competition in the Sector

Images saved in a Graphics Interchange Format (GIFs) have become very popular in the past years, despite their origin dating back to 1987.⁶ The Internet and the growing trend of visual communication has popularized these animated graphics files (typically distinguishable by the

⁶ Additional information on GIFs can be found in the following link <https://en.wikipedia.org/wiki/GIF>



“.gif file format”) thanks to their wide support and portability between applications and operating systems.

As visual communication grows, companies focusing upon providing customers with online databases and search engines that allow users to search for and share GIF files have entered the market in the past few years. It is important to note that what most companies active in this visual communications sector offer users is multifaceted GIF creations and GIF library services. In other words, visual communication companies allow users to search their GIFs databases and use the GIFs of their choice to communicate. Additionally, as discussed further below, there are minimal to low barriers to entry to this sector. As a result, innovation-focused competition is intense in this sector.⁷

a) Multiple Players

According to publicly available sources, Giphy represents one market player of at least nine other companies active in the provision of GIFs to users. Giphy competes with *Tenor*, *Reddit*, *Gfycat*, *Imgur*, *Reaction GIFs*, *GIFbin*, *Tumblr*, and *Imgflip*.⁸ Other sources also suggest that *Free GIF Maker* and *Know Your Meme* are also active in this sector.⁹

Giphy, *Tenor*, and *Gfycat*, three of the main companies in this sector, seem to have business interests with important technology companies present in the communications segment. As such, the following large Application Programming Interface (API) partners of Tenor and Gfycat do

⁷ GIFs are a form of a file that refers to a spectrum covering from stickers to videos. GIFs and GIF stickers are practically identical, the main difference being that GIF stickers have no background so that they can be rendered as a layer on top of user-made pictures or videos without distorting the underlying image. In addition to GIF stickers there is a variety of other stickers (e.g. location, hashtag, date & time stickers) that users use in addition to or instead of GIF stickers which may be created by social media apps themselves. From a user perspective GIFs and short video clips are very similar. Giphy has recently introduced short video clips on its website in addition to its sticker and GIF products.

⁸ <https://www.typeform.com/blog/ask-awesomely/best-gifs/>

⁹ <https://www.searchenginejournal.com/find-gifs-memes/351988/#close>



not appear to be partners of Giphy, namely: *Google Gboard, Kika, LinkedIn, Touchpal, Zynga, Discord, Viber, and Tango*. Companies present in this sector frequently offer their products free to the user.

Against this background, and taking into consideration that the acquirer is not present in this sector, it is challenging to anticipate how the Transaction will have an impact upon the current market dynamics other than to make it more competitive. The sector will continue to operate under intense innovation-focused competition with multiple players innovating and offering enhanced GIF-related goods and services for users to continue to advance their visual communications free of charge.

b) Limited Barriers to Entry

CCIA recognizes that there have been some concerns raised with respect to access to data and barriers to entry once Facebook completes the Transaction. Based upon publicly available information, CCIA understands that these concerns may have been raised due to a lack of understanding of the nature of the data at stake in this Transaction.

CCIA cautions against intervention in innovation-driven markets that involve user data without evidence of harm to competition that could disadvantage consumers and deter innovation, especially when based upon a misunderstanding or incorrect understanding of the role data plays in these markets.

The mere accumulation of data is inconsequential to a competition analysis. In this respect, because there are numerous companies that provide GIF-related services to consumers, and that have been created in recent years, it suggests that access to data does not really have an impact on the market. Therefore, when it comes to data relating to GIFs, it does not seem that



accessibility to the data produced by GIF users acts as a barrier to entry to innovative market players.

To the contrary, compared to other less innovative segments of the economy, the role of data in these innovative sectors relating to visual communications seems to be quite modest. Rather, competition in this new type of service provision seems to be focused on the ability to provide customers a better user experience with better solutions to access GIFs including search results, so success depends upon the ability and capacity of market participants to use customers' data towards improving the services and products offered to the users.

c) Raising Rivals' Costs

One of the potential theories of harm related to vertical mergers refers to the ability to foreclose competitor access to a vital input or distribution channel, as well as the ability to access competitors' sensitive information through the sales of a vertically related product, or the ability to raise rivals' costs.

In this particular Transaction none of these theories seem to be applicable. In the digital space, and in particular in the visual communications space, it is inconceivable that it will become too expensive or impossible to produce substitutable GIF functionality, irrespective of whether the transaction is completed or not.

As described above, the same relevant market players in the GIF sector will continue to compete against each other following the acquisition. In fact, one of the characteristics of the digital space that makes the digital economy so innovative is that there are limitless opportunities to create input, with none of the products or services being essential for the proliferation of innovative goods and services to enter the markets.



As such, the Transaction will not affect competitors' ability to compete or grow in any form, nor would the merged entity have any incentives to engage in any conduct that may violate the competition norms. To the contrary, and assuming that Facebook and Giphy would combine their human capacity, it may be reasonable to expect new products and services to be introduced in this sector.

Consequently, it is reasonable to conclude that the Transaction might provide for even more incentives to this sector and encourage market players to continue to innovate to provide users with new or improved products and services that would allow market participants to continue to effectively compete.

d) Interoperability and Multi-Platform Integration Safeguarding

CCIA believes that open-by-design services and the use of Application Programming Interfaces¹⁰ (“APIs”) to enhance interoperability and integration with multiple digital services is generally pro-consumer when design and innovation can provide for such an option.

The GIF sector seems to rely upon the ability of users to integrate GIFs in multiple platforms. In this respect, Giphy has created an app ‘extension’ that integrates its GIF database directly into the API of other third-party apps (e.g., Snapchat, TikTok, or Instagram). This allows users to search and incorporate GIFs directly into social media content within the host app without having to open Giphy’s own website or app. It is important to note that Giphy does not charge any fees to its API partners for this integration. In addition, Giphy has also developed a Software Development Kit (“SDK”) that provides tools to third-party host apps to program Giphy’s library in such a way that its integration is aligned with the style and functionality of the host app’s user interface.

¹⁰ An API is the software interface that allows users to use and navigate around mobile apps.



Based upon publicly available information, Giphy does provide the possibility to integrate the same search service and GIF database to all market players including many of Facebook's competitors such as Twitter, Signal, and TikTok to name a few.

The market dynamics herewith described, lead to the logical conclusion that Facebook will have the same post-transaction incentives to maintain the interoperability and integration features of Giphy intact unless future innovations or product improvements prove to be the opposite. In this respect, it is important to highlight that, as explained before, the GIF related services' success depends upon the capacity to provide users with solutions including the possibility to use the GIFs search and databases across the different number of platforms and communication services where users operate. Because most users 'multi-home,' it would be counterproductive for Facebook to end the open, interoperable, and integrative features that currently characterize Giphy's products and services, unless innovation trade-offs justify them.

Notwithstanding the incentives of Facebook to maintain Giphy's openness, CCIA understands that the ACCC may want to seek formal commitments from the parties involved in the Transaction.

In this context, Facebook has already publicly stated that it will keep the Giphy API free and open, which as a practical matter, should suffice. The public backlash from Facebook reneging on that promise would be so significant that Facebook would not have promised open APIs unless it was committed to, in fact, keeping them open. Formal commitments are also a possibility, of course, but imposing those without an actual need could deter Facebook and others from voluntarily offering public commitments in the first place, which would be a highly counterproductive outcome.

CCIA contends that the market incentives for market players to advance in this innovative visual communications sector in an integrated manner are so evident that the ACCC should not take further action on this front. However, with the acknowledgment that the ACCC is endeavoring a



lot of its capacity to ensure that competition governs/reigns over the digital economy, CCIA believes that Facebook's publicly made commitments to guarantee that multi-platform integration is maintained following the completion of the Transaction are an important element to be taken into account when analyzing the merger.

By taking into consideration Facebook's commitments, the ACCC would strike an appropriate balance by reviewing the merger and demanding safeguards for its Transaction-specific concerns, rather than opting to block the merger, inevitably harming innovation, investments, and consumers. On the other hand, exhaustive examination of overly speculative theories of harm and unnecessarily extended reviews of all technology industry transactions would be unfair, and will mean investors get lower valuations and even lose money in the form of invested time. Eventually, investors will be discouraged from making investments in technology markets in the future to the ultimate detriment of consumers.

5. Conclusion

CCIA believes the impact upon innovation and the positive outcomes for consumers are a core element of analysis of this Transaction. Publicly available information indicates that there is vigorous competition in the GIF sector, with the presence of multiple players innovating in the market to the benefit of consumers. Consequently, the Transaction does not seem to substantially lessen competition or negatively impact consumers. To the contrary, competition law and economics applied to the Transaction indicate that the integration will likely bring about pro-consumer benefits. Hence, CCIA submits that the Transaction should not be the subject of any regulatory intervention.