

## Too Little, Too Late: Facebook, GIFs, and the CMA

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### ABSTRACT

*The legal mechanisms dealing with mergers, until recent developments, have lost sight of the principles of competition law. The CMA's ruling on the Meta–Giphy acquisition is very telling of the approach to come, but it is submitted that so much has passed through the weak sieve provided by competition law that to ring the alarm bells now would be unfortunate.*

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Dear Editor,

What can be said of competition law? It lacks a glamorous history, having had its genesis in late 19th century USA. It lacks esteem amongst lawyers and political society. And, fundamentally, the argument has been made that it lacks principle.<sup>1</sup> Competition lawyers and consumers more generally are victims of institutions that ought to function as competent regulators. This is all the more valid when we concentrate on mergers, where economics and law meet but do not reach a satisfying conclusion. This is true insofar as competition law has focused on neoclassical price theory (looking at the market in terms of price and output),<sup>2</sup> which is not suited to the complexity of the modern economy. Whilst this will be elaborated upon, it is sufficient now to note that price and output comprise only two factors of the market, and do not account for issues including privacy, data accumulation, and innovation.

Tech mergers are a given in today's milieu. Apple's acquisition rate is equivalent to roughly one company every month.<sup>3</sup> Microsoft has just announced its intentions to acquire Activision Blizzard, the studio that produces a series of video games including Call of Duty. Their \$69bn bid eclipses the \$26bn they had paid for LinkedIn in 2016.<sup>4</sup> Google's acquisitions span the gamut of digital operations, from gaming to health.<sup>5</sup> Competition law has not developed a strong enough foundation to appreciate all the nuances of these mergers and acquisitions because the genesis of competition law could simply not have

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<sup>1</sup> See Robert Bork, *The Antitrust Paradox*, (1st edn, 1978 New York: Free Press).

<sup>2</sup> The CMA has had broader powers than this in the sense that they may look at network effects, economies of scale and regulatory and structural barriers, but the point remains that traditional competition law thinking was centred around price and output. See Amelia Fletcher, 'Market Investigations for Digital Platforms: Panacea or Complement?' (2020) 12 1 *Journal of European Competition Law and Practice* 44.

<sup>3</sup> Kif Leswing, 'How Apple Does M&A: Small and Quiet With No Bankers' (*CNBC*, 1 May 2021) <<https://www.cnbc.com/2021/05/01/how-apple-does-ma-small-and-quiet-with-no-bankers.html>> accessed 2 January 2022.

<sup>4</sup> *The Economist*, 'Why Microsoft is Splashing \$69bn on Video Games' (*The Economist*, 22 January 2022) <<https://www.economist.com/business/why-microsoft-is-splashing-69bn-on-video-games/21807242>> accessed 22 January 2022.

<sup>5</sup> Tommaso Valletti and others, 'Google/Fitbit Will Monetize Health Data and Harm Consumers' (*VoxEU*, 30 September 2021) <<https://voxeu.org/article/googlefitbit-will-monetise-health-data-and-harm-consumers>> accessed 10 January 2022.

accounted for the tech giants of today. The original ‘antitrust’ approach was intended to rein in the power of corporate trusts, where the main concern was the inflated prices and restricted output. It is thus hard to translate a mechanism built for these purposes onto, say, companies like Google or Meta which do not charge the user for services and are not concerned with restricting output.

Recently, however, a growing self-awareness among regulators has manifested in the Competition and Market Authority’s (CMA) decision on the Meta–Giphy acquisition.<sup>6</sup> Essentially, Meta has been ordered to unwind its acquisition of Giphy. This means returning to a point prior to the acquisition and taking it from there: a controversial method of promoting a healthy market structure sometimes compared to trying to ‘unscramble the eggs’.<sup>7</sup> This is an easy analogy as the unwinding is a result of an ex-post merger review. However, without this form of review ‘virtually the only hurdle of merging parties is the initial review’ which, as will later be explored, is not a high hurdle.<sup>8</sup>

This is the first time that a major tech company has been instructed to act in such a fashion. In the past, all that these giants would expect was a fine or to be told that some element of the deal must be changed as a legally imposed remedy. The latter, of course, was hard to monitor. A condition of Facebook, as it then was, buying WhatsApp in 2014 had been that it create some sort of firewall in order to prevent data gathered on WhatsApp from being shared with its parent. A 2016 update of the terms and conditions of WhatsApp provided that you could *opt out* of your data being shared with Facebook in order to create targeted advertisements.<sup>9</sup> This illustrates the point that previous regulatory moves were far too lax.

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<sup>6</sup> UK Government, ‘CMA Directs Facebook to Sell Giphy’ (*gov.uk*, 30 November 2021) <<https://www.gov.uk/government/news/cma-directs-facebook-to-sell-giphy>> accessed 10 January 2022.

<sup>7</sup> Tommaso Valletti and John Kwoka, ‘Unscrambling the Eggs: Breaking Up Consummated Mergers and Dominant Firms’ (2021) 30(5) *Industrial and Corporate Change* 1286.

<sup>8</sup> *ibid* 1292.

<sup>9</sup> Lily Hay Newman, ‘WhatsApp Has Shared Your Data with Facebook for Years, Actually’ (*Wired*, 8 January 2021) <<https://www.wired.com/story/whatsapp-facebook-data-share-notification/>> accessed 11 January 2022.

Returning to Giphy, it might not be obvious how their acquisition poses a threat to competition, so a glance at this would be apt. There is a two-tiered threat:

1. In the market for advertisers, Giphy was certainly gaining more attention. It had partnered with Pepsi and Dunkin' Donuts to create GIFs as a mode of promoting the brands. Giphy is innovating in the market for advertisers. In this way, it could have posed a threat to Meta's hold on advertisers.
2. Rivals of Facebook and other Meta-owned brands used Giphy. Users on Tiktok, iMessage, and Twitter are readily found inserting GIFs into comments or messages. In this way, Meta, via the acquisition, has gained the power to limit use of Giphy on the platform of their competitors or require that users of Giphy provide more data.

It might seem like a pyrrhic victory. The regulators have already set a lax precedent, allowing tech giants to acquire undertakings with seemingly little regard for the health of the market or consumer choice and providing users with remedies that do not fully cover the extent of consumer harm. Meta owns Facebook, Messenger, Instagram, WhatsApp, and so on. The latter two acquisitions have clearly not been subjected to scrutiny to the extent that the Giphy acquisition has been. Meta-owned sites account for 73% of time spent on social media.<sup>10</sup> To sound the alarms at GIFs seems almost comical. With a cynical view, one could hypothesise that Dr. Coscelli's term as the Chief Executive at the CMA is coming to a close soon – he may be concerned about the legacy he leaves behind. In this way, the order to unwind would represent a last-ditch, yet not overly ground-breaking, effort to promote competition in the UK.

It may be that this demonstrates the legal mechanisms have, until recently, been unable to attend to the digital giants.<sup>11</sup> German and Austrian legislators have proposed a shift from the current EU position (mergers are generally only scrutinised if they pass a turnover threshold) to a newer one, in which deals

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<sup>10</sup> See n 5.

<sup>11</sup> See the discussion on neoclassical price theory and tech mergers.

would be considered if the transaction surpasses a given figure.<sup>12</sup> This sort of position would be better able to promote competition and ensure that start-ups can emerge in a healthy market. Going beyond start-ups, roughly 94% of mergers with a Union dimension are cleared at the ‘Phase I’ stage, meaning they are not subjected to serious legal or economic scrutiny. Mergers touch not only on competition law, but several areas including employment law, commercial law, company law, and so on. Their ability to be socially problematic (see the recent vote to unionise at Activision Blizzard, a reflection of the worry Microsoft’s bid caused)<sup>13</sup> means that the authorities ought to attend to them with nuance and urgency.

Ederer *et al.* presented a notable paper on the effect of killer acquisitions in the pharmaceutical industry, showing how authorities have failed to create a legal framework that encourages free markets yet maintains consumer welfare.<sup>14</sup> A similar logic can be applied to the technology industry. Authorities have failed to understand the nuances of businesses in these two realms, concentrating only on approaches which are overly formalistic and legal. For example, it is currently the case that the notification system is not mandatory in the UK, but the parties *should* notify the CMA if the transaction:

- a. Will cause the parties to supply 25% or more of the relevant market; or
- b. The UK turnover of the target firm is greater than £70m.

Giphy clearly falls short of (b), but it is a large player in the GIFs market. Its only notable competitor is the Google-owned Tenor. If this acquisition had not been ordered to be unwound, GIFs would be another ground for a data proxy-war between Meta and Google. As such, this decision provides some reason for the antitrust lawyer to be optimistic:

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<sup>12</sup> OECD, ‘Start-ups, Killer Acquisitions and Merger Control’ (OECD, 2020) <[www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control-2020.pdf](http://www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control-2020.pdf)> accessed 15 January 2022.

<sup>13</sup> Kari Paul, ‘Activision Blizzard Workers Form First of its Kind Game Workers Alliance Union’ *The Guardian* (London, 21 January 2022) <<https://www.theguardian.com/technology/2022/jan/21/activision-blizzard-employees-union>> accessed 21 January 2022.

<sup>14</sup> Florian Ederer and others, ‘Killer Acquisitions’ (2020) 129(3) *Journal of Political Economy* 649.

*Big Tech will also refrain from making as many killer acquisitions, knowing that European antitrust regulators, some emboldened by new powers, are more likely to clamp down on them. The U.K.'s decision to reverse Facebook's acquisition of Giphy at the tail end of 2021 was an omen of what's to come.*<sup>15</sup>

Emboldened is a correct description. Competition is one of the few areas of law where movements can be seen on a global scale. The original American antitrust approach has come a long way. This recent decision will propel it further and bring competition law closer to the objectives it was implemented to uphold.<sup>16</sup> That is surely a development of note.

Yours faithfully,  
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<sup>15</sup> Parmy Olson, 'Parmy Olson's View to 2022: Big Tech Gets Regulated' *The Washington Post* (Washington D.C., 31 December 2021) <[https://www.washingtonpost.com/business/parmy-olsons-view-to-2022-big-tech-gets-regulated/2021/12/31/44683faa-6a0c-11ec-9390-eae241f4c8b1\\_story.html](https://www.washingtonpost.com/business/parmy-olsons-view-to-2022-big-tech-gets-regulated/2021/12/31/44683faa-6a0c-11ec-9390-eae241f4c8b1_story.html)> accessed January 10 2022.

<sup>16</sup> These include fair markets, facilitating a market structure that allows for innovation and consumer welfare.