

BETWEEN:

META PLATFORMS, INC.

Applicant

- and -

THE COMPETITION AND MARKETS AUTHORITY

Respondent

- supported by –

PRIVACY INTERNATIONAL

Applicant to Intervene

REQUEST FOR PERMISSION TO INTERVENE

Applicant: Privacy International, 62 Britton Street, London EC1M 5UY

Applicant's legal representative and address for service: Anna Morfey, Wessen Jazrawi and Ginevra Bicciole, Hausfeld & Co LLP, 12 Gough Square, London EC4A 3DW

Applicant's counsel: Sarah Love and Sophie Bird, Brick Court Chambers, 7-8 Essex Street, London WC2R 3LD

Introduction

1. This is a request for permission to intervene brought on behalf of Privacy International (“**PI**”) pursuant to Rule 16 of the Competition Appeal Tribunal Rules 2015 (the “**Rules**”). PI is being represented in this matter on a *pro bono* basis.
2. The request to intervene is in respect of an application (the “**Application**”) brought by Meta Platforms, Inc. (“**Meta**”) for review, under s.120 of the Enterprise Act 2002, of the decision of the Competition and Markets Authority (the “**CMA**”) in relation to Meta’s acquisition of GIPHY, Inc. (“**GIPHY**”) (the “**Merger**”). The Application was filed on 23 December 2021 and published on 5 January 2022.
3. The subject of the Application is the CMA’s decision contained in its Final Report dated 30 November 2021 (the “**Decision**”). By the Decision, the CMA concluded that the Merger gave rise to a ‘relevant merger situation’ and would lead to a substantial lessening of competition (“**SLC**”) within a market for services in the UK in two respects: (i) the Merger would create a “**Horizontal SLC**” in the supply of display advertising in the UK and (ii) the Merger would create a “**Vertical SLC**” by reason of the potential foreclosure of GIFs from GIPHY as an input to Meta’s competitors on social media markets in the UK. The CMA determined that to remedy either or both of the SLCs, Meta was required to divest itself of GIPHY.
4. PI intends to support the position of the CMA.

Grounds for request to intervene

(1) PI’s substantial interest in the outcome of the proceedings

5. PI is a London-based non-profit, non-governmental organisation (Charity Number: 1147471) that researches and advocates globally against corporate and government abuses of data and technology. It challenges overreaching corporate and state surveillance so that people everywhere can have greater security and freedom through greater personal privacy. Within its range of activities, PI investigates how individuals’ personal data is generated online and exploited, and how it can be protected through legal and technological frameworks. It employs data experts, investigators, policy experts and lawyers, who work together to understand emerging technology and to consider how

existing legal definitions and frameworks map onto such technology, including in relation to online platforms and the advertising technology industry.

6. PI has an established track record of effective and helpful engagement with competition regulators around the world on issues that concern the intersection of data privacy and competition law. PI has previously submitted evidence to the European Commission,¹ the CMA² and the U.S. Federal Trade Commission regarding data and competition issues.³ In particular, PI submitted comments to the CMA on its online platforms and digital advertising market study, published in July 2020,⁴ to which numerous references are made in the Decision.
7. Recently, PI intervened and made submissions before the European Commission⁵ and the Australian Competition and Consumer Commission⁶ in their respective reviews of Google LLC's acquisition of Fitbit, Inc. PI was admitted as an interested third person in the European Commission proceedings⁷ and its submissions were cited in the public version of the Commission's final merger decision.⁸

¹ PI, Privacy International's submission to the European Commission consultation on 'shaping competition policy in the era of digitisation', 2 October 2018, <https://www.privacyinternational.org/sites/default/files/2018-10/ec-competition1018.pdf>.

² PI, Submission to the Competition and Markets Authority's call for information on digital mergers, 23 July 2019, <https://privacyinternational.org/node/3097>.

³ PI, Submission to the US Federal Trade Commission on the intersection between privacy, big data, and competition, 1 August 2018, <https://privacyinternational.org/report/2262/submission-us-federal-trade-commission-intersection-between-privacy-big-data-and>

⁴ PI, Comments on the Competition and Markets Authority's interim report on online platforms and digital advertising, 12 February 2020 https://privacyinternational.org/sites/default/files/2020-04/20.02.12_CMA_PI_Comments_Interim_Report_FINAL.pdf; Response to the CMA's online platforms and digital advertising market study, 29 July 2019, <https://privacyinternational.org/advocacy/3101/response-cmas-online-platforms-and-digital-advertising-market-study>.

⁵ PI, European Commission's review of the Google/Fitbit merger, <https://privacyinternational.org/legal-action/european-commissions-review-googlefitbit-merger>; Submission to the European Commission regarding the proposed acquisition of Fitbit, Inc. by Google LLC (Case M.6990 Google/Fitbit), https://privacyinternational.org/sites/default/files/2020-07/WEB_20.07.03_PI_SubmissionEC_Google_Fitbit.pdf (the "Google/Fitbit Intervention").

⁶ PI, Submission to the Australian Competition and Consumer Commission on the proposed acquisition of Fitbit, Inc. by Google LLC, 24 March 2020, https://privacyinternational.org/sites/default/files/2020-07/WEB_20.03.25_PI_Submission_Google_Fitbit_ACCC_FINAL.pdf; Response to the Australian Competition and Consumer Commission's Statement of Issues: Proposed acquisition of Fitbit, Inc. by Google LLC, 10 July 2020, https://privacyinternational.org/sites/default/files/2020-07/WEB_20.07.09_PI_Google_Fitbit_Response_ACCC_SOI_FINAL.pdf.

⁷ See https://ec.europa.eu/competition/mergers/cases1/202120/m9660_3317_3.pdf.

⁸ Decision in Case M.9660 – GOOGLE/FITBIT, 17 December 2020, [m9660_3314_3.pdf \(europa.eu\)](https://ec.europa.eu/competition/mergers/cases1/202120/m9660_3314_3.pdf), at recitals (446)(g) and (452).

8. Moreover, and of especial relevance to its interest in the outcome of the proceedings, PI participated in Phase 1 of the CMA's review of the Merger at issue in this case. PI's submissions focused on Meta's ownership and use of data as a factor in the competitive assessment of the Merger.⁹ The findings of the CMA in the Decision, particularly as to the potential ways in which Meta might, post-Merger, foreclose other social media platforms, are consistent with the concerns that PI expressed in its submissions.
9. In the circumstances, the decision that Meta divest GIPHY, which prevents Meta from further consolidating its market power in an area subject to significant privacy concerns, is of obvious importance to PI's interests.
10. §4.92 of the Tribunal's Guide to Proceedings 2015 recognises that the Tribunal's decisions "*may have far-reaching consequences for third parties and the wider public interest.*" The outcome of the Application will affect the millions of internet users who provide online platforms with their data. This is thus a paradigmatic example of a case that raises issues of wider public significance. As a leading digital rights organisation whose objective is to promote consumers' rights and defend their privacy, PI is uniquely positioned to protect and represent the interests of the many affected consumers, in particular in respect of their privacy rights and the ways in which their data are used.
11. In addition, the Application will be the first case before the Tribunal concerning a decision that was taken under the CMA's new (2021) Merger Assessment Guidelines. The outcome of the proceedings (and the Tribunal's reasoning in support of that outcome) may well have wider implications for the future regulation of mergers in digital markets and, in particular, for the way in which the CMA assesses the impact of companies' ownership and exploitation of users' data. Accordingly, PI, in its representative capacity, has a substantial interest in the outcome.

⁹ PI, Submission to the UK Competition And Markets Authority regarding the Facebook/Giphy Merger Inquiry, March 2021, https://privacyinternational.org/sites/default/files/2021-03/PI%27s%20Submission%20to%20the%20UK%20Competition%20and%20Markets%20Authority_0.pdf PI also made similar submissions before the Australian Competition and Consumer Commission, https://privacyinternational.org/sites/default/files/2021-03/Submission%20to%20the%20Australian%20Competition%20and%20Consumer%20Commission_0.pdf.

(2) *PI's expertise and anticipated contribution to the proceedings*

12. Meta challenges the Decision on six grounds. In its intervention, PI does not wish to repeat submissions that the CMA is better placed to make. Rather, PI intends to leverage its specialist knowledge of how privacy and data protection rights interact with competition law to support the CMA's Decision.
13. PI has not had the benefit of seeing an unredacted version of the Decision and nor has it seen the full grounds of challenge or any other documents lodged in the case. PI's position as to the detailed scope of its intervention is necessarily reserved pending sight of the unredacted Decision and Application. Nevertheless, based on the principal grounds of challenge as set out in the Tribunal's published summary, PI anticipates intervening in respect of grounds 1, 2 and 5. These concern, respectively, the CMA's findings: (i) that the Merger will result in a Horizontal SLC; (ii) on market power; and (iii) on the appropriate remedy in the light of its findings on the Horizontal and / or Vertical SLC.
14. It appears, from the summary, that by ground 1 Meta seeks to challenge the CMA's use of the concept of 'dynamic competition' and its assessment of whether the Merger will, through a loss of dynamic competition, lead to an SLC in the supply of display advertising services in the UK, a fast-moving digital market. Ground 2 puts in issue the CMA's definition of the relevant market in the context of the market for supply of digital advertising and its assessment of Meta's market power.
15. Taken together, these grounds concern fundamental competition concepts in digital markets: market definition; market power; potential competition; and the harm to consumers from a loss of such potential competition. The assessment of these concepts necessarily involves consideration of the extent to which technology companies can obtain user data; the relevance of this data to their digital advertising offerings as well as other digital services; and the use which they can make of the data to strengthen their market power. Due to its expertise in the intersection of data, privacy rights and competition law, PI is ideally positioned to assist the Tribunal in relation to these aspects of grounds 1 and 2. In particular, PI has for years investigated and engaged with the advertising technology industry, in which Meta is a major player.¹⁰ PI can provide insight

¹⁰ By way of example, PI has submitted complaints to data protection authorities in the UK, France and Ireland against major actors in the advertising technology, data broking and credit referencing industries.

into the industry's reliance on user data for market power, and the impact of the same on consumers' rights and freedoms.¹¹

16. In relation to ground 5, Meta contends that a finding of a Vertical SLC alone would not justify imposition of the divestiture remedy. PI's experience of privacy issues and understanding of the effectiveness of regulatory commitments in digital markets makes PI particularly well-placed to assist the Tribunal as to the reasons why the Decision to require divestiture was proportionate and why the alternative remedies proposed by Meta are insufficient.¹² PI intends to make focused submissions in relation to, *inter alia*, the ability of technology companies to foreclose competition through the acquisition of data; the corresponding risks of online platforms with significant market power conditioning access to their services on the exploitation of users' personal data; and the remedies required to ensure that the incentives to engage in such conduct are adequately addressed.
17. As far as PI is aware, this is the first application for permission to intervene before the Tribunal brought by a charitable or campaigning organisation. In respect of third-party interventions in judicial review proceedings, the High Court has stated that it is "*well established and beneficial, to allow interventions by groups or bodies, or individuals who have particular knowledge and expertise in the area, whether in terms of the effect which the action at issue may have upon them and their interests, or by virtue of the work which they carry out... or because of the campaigning experience and knowledge which their activities have brought.*"¹³ PI respectfully submits that its particular knowledge and expertise in data privacy rights in digital markets, and its global perspective on data privacy issues, will allow it to address the Tribunal helpfully by complementing, rather than duplicating, the submissions of the UK's expert competition regulator, the CMA.

These complaints relied on extensive research into the industry's exploitation of personal data, which is often gathered from users' interactions with social media sites, and which feeds into the targeted advertising displayed by such sites. See: PI, Our complaints against Acxiom, Criteo, Equifax, Experian, Oracle, Quantcast, Tapad, 8 November 2018, <https://privacyinternational.org/advocacy/2426/our-complaints-against-acxiom-criteo-equifax-experian-oracle-quantcast-tapad>.

¹¹ For example, in the Google/Fitbit Intervention, PI provided relevant information on how the merger would augment Google's dominance in the digital advertising market as Google would benefit from Fitbit's valuable data troves, leading to a further lessening of competition in these markets.

¹² PI's submissions in the Google/Fitbit Intervention explained why various remedies could not address the competition concerns that arose in the circumstances of the proposed transaction.

¹³ *R (Air Transport Association of America Inc) v Secretary of State for Energy and Climate Change* [2010] EWHC 1554, at [8].

18. PI envisages limiting its intervention to written submissions. That having been said, if permitted to intervene it would wish to reserve the right to apply to file evidence and / or to intervene orally, should such steps appear appropriate in due course. PI intends its submissions to be concise and is amenable to any reasonable limit that the Tribunal may impose on their length. PI considers that its intervention would not cause any disruption to the timetable to the hearing of the proceedings.
19. In short, as set out above, PI's charitable objectives (which focus on the protection of consumers' data privacy rights), its expertise, its track record of regulatory submissions and its prior involvement in the CMA's review of the Merger demonstrate both that it has a sufficient interest in the outcome of the proceedings and that its submissions will assist the Tribunal on the matters engaged by grounds 1, 2 and 5 of the Application. The Tribunal is respectfully asked to allow the intervention in the exercise of its discretion.
20. PI notified Meta (via its lawyers, Latham & Watkins LLP) and the CMA of its intended intervention by letters dated 21 January 2022, which requested Meta and the CMA to indicate whether they intended to oppose it. As of the date of this request, no response has been received by either party.

Directions

21. PI understands that, pursuant to §1 of the President's order of 31 December 2021, the CMA will already have filed its Defence by the date of the Case Management Conference at which this application will likely be considered (15 February 2022). Accordingly, if the Tribunal permits PI to intervene, PI will ask the Tribunal to direct that:
 - (a) PI be joined as an intervener and permitted to file and serve a written statement of intervention, pursuant to Rule 16(6) of the Rules;
 - (b) PI be served with Meta's Application and the CMA's Defence, pursuant to Rule 16(7); and
 - (c) PI be provided with an unredacted version of the Decision and a copy of any other documents lodged and to be lodged with the Registrar relating to the proceedings.

22. In order to facilitate these steps, PI will request that its legal advisers be admitted to any advisers' confidentiality ring that may be in place.
23. PI is mindful that the hearing of the Application has been listed for 4 days, from 25 April 2022. PI would be happy to liaise with the parties as to the appropriate timing for the filing of its statement of intervention. As indicated in §18 above, at this stage (and subject to liberty to apply), PI envisages limiting its intervention to written submissions only.

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26 January 2022