Neutral citation [2020] CAT 23

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1366/4/12/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

13 November 2020

Before:

HODGE MALEK QC
(Chairman)
TIM FRAZER
TIMOTHY SAWYER CBE

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) FACEBOOK, INC.
(2) FACEBOOK UK LIMITED

Applicants

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

Heard remotely on 19 and 20 October 2020

JUDGMENT

APPEARANCES

Robert O'Donoghue QC, Gerard Rothschild and Tom Pascoe (instructed by Latham & Watkins (London) LLP) appeared on behalf of the Applicants.

Marie Demetriou QC, Brendan McGurk and Emma Mockford (instructed by the Competition and Markets Authority) appeared on behalf of the Respondent.

CONTENTS

A. INTRODUCTION

1. On 26 August 2020, Facebook, Inc. ("Facebook") and Facebook UK Limited ("Facebook UK") (together, "the Applicants") filed an application under s.120 of the Enterprise Act 2002 as amended ("EA02") for a review of the Competition and Markets Authority's ("the CMA") refusal to grant derogations from an initial enforcement order ("IEO") made by the CMA on 9 June 2020 in connection with a completed merger between Facebook and GIPHY, Inc. ("GIPHY") ("the Application").

2. A case management conference was held remotely on 9 September 2020 and the Chairman made a case management directions order on 10 September 2020 ("the Directions Order"). The main hearing was held remotely on 19 and 20 October 2020.

3. This is the unanimous decision of the Tribunal.

B. STATUTORY FRAMEWORK

4. The UK statutory provisions for merger control are contained in Part 3 of the EA02. The EA02 provides for a two-stage review for completed mergers, generally referred to as Phase 1 and Phase 2, although those terms are not used in the statute. In respect of a completed merger, s.22(1) EA02 places the CMA under a duty in Phase 1 to decide whether or not to make a Phase 2 reference as follows:

> "**22 Duty to make references in relation to completed mergers**
>
> (1) The CMA shall, subject to subsections (2) and (3), make a reference to its chair for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013 if the CMA believes that it is or may be the case that—
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> (a) a relevant merger situation has been created; and
>
> (b) the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services."

5. Where a Phase 2 reference in relation to a completed merger is made, s.35 EA02 places the CMA under a duty to decide the following questions:

> "**35 Questions to be decided in relation to completed mergers**
>
> (1) Subject to subsections (6) and (7) and section 127(3), the CMA shall, on a reference under section 22, decide the following questions—
>
> (a) whether a relevant merger situation has been created; and
>
> (b) if so, whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services."

6. Where the CMA decides that the completed merger results in an anti-competitive outcome, s.41(2) EA02 places the CMA under a duty to remedy the effects of the completed merger:

> "**41 Duty to remedy effects of completed or anticipated mergers**
>
> (1) Subsection (2) applies where a report of the CMA has been prepared and published under section 38 within the period permitted by section 39 and contains the decision that there is an anti-competitive outcome.
>
> (2) The CMA shall take such action under section 82 or 84 as it considers to be reasonable and practicable—
>
> (a) to remedy, mitigate or prevent the substantial lessening of competition concerned; and
>
> (b) to remedy, mitigate or prevent any adverse effects which have resulted from, or may be expected to result from, the substantial lessening of competition."

7. When the CMA is considering whether to make a Phase 2 reference under s.22 EA02 and has reasonable grounds for suspecting that the arrangements will result in two or more enterprises ceasing to be distinct, the CMA may make an IEO for the purpose of preventing pre-emptive action and, where the CMA also has reasonable grounds for suspecting that pre-emptive action has or may have been taken, for the purpose of restoring the position to what it would have been had the pre-emptive action not been taken or for the purpose of mitigating its effects. The relevant subsections of s.72 EA02 read as follows:

> "**s.72 Initial enforcement orders: completed or anticipated mergers**
>
> (1) Subsection (2) applies where—

(a) the CMA is considering whether to make a reference under section 22 or 33; and

(b) the CMA has reasonable grounds for suspecting that it is or may be the case that two or more enterprises have ceased to be distinct or that arrangements are in progress or in contemplation which, if carried into effect, will result in two or more enterprises ceasing to be distinct.

(2) The CMA may by order, for the purpose of preventing pre-emptive action—

(a) prohibit or restrict the doing of things which the CMA considers would constitute pre-emptive action;

(b) impose on any person concerned obligations as to the carrying on of any activities or the safeguarding of any assets;

(c) provide for the carrying on of any activities or the safeguarding of any assets either by the appointment of a person to conduct or supervise the conduct of any activities (on such terms and with such powers as may be specified or described in the order) or in any other manner;

(d) do anything which may be done by virtue of paragraph 19 of Schedule 8.

(3) […]

(3A) Subsection (3B) applies where—

(a) subsection (1)(a) and (b) applies; and

(b) the CMA also has reasonable grounds for suspecting that preemptive action has or may have been taken.

(3B) The CMA may by order, for the purpose of restoring the position to what it would have been had the pre-emptive action not been taken or otherwise for the purpose of mitigating its effects—

(a) do anything mentioned in subsection (2)(b) to (d);

(b) impose such other obligations, prohibitions or restrictions as it considers appropriate for that purpose.

[…]"

8. The CMA may grant derogations from an IEO under s.72(3C) EA02, which provides, "*A person may, with the consent of the CMA, take action or action of a particular description where the action would otherwise constitute a contravention of an order under this section*". Section 72(7) EA02 requires, "*the CMA shall, as soon as reasonably practicable, consider any representations received by it in relation to varying or revoking an order under this section*".

9. Pre-emptive action is defined in s.72(8) EA02 as "*action which might prejudice the reference concerned or impede the taking of any action under [Part 3 EA02] which may be justified by the CMA's decisions on the reference*". By virtue of paragraph 19 of Schedule 8 to the EA02, an IEO may require any person to supply information to the CMA. Failure, without reasonable excuse, to comply with an IEO made under s.72 EA02 may result in the imposition of a penalty that the CMA considers appropriate, which shall not exceed 5% of the total value of the turnover (both in and outside the UK) of the enterprises owned or controlled by the person on whom the penalty is imposed (see s.94A EA02).

10. The current wording of s.72 EA02 is a result of legislative reform implemented by s.30 of the Enterprise and Regulatory Reform Act 2013 ("the ERRA 2013"). Three of the changes to s.72 EA02 that were implemented by s.30 ERRA 2013 are: (i) the circumstances in which the CMA may make an IEO were broadened; (ii) s.72(3C) EA02 was inserted to give the CMA power to consent to derogations from the IEO; and (iii) the definition of pre-emptive action was inserted at s.72(8) EA02. The former conditions under which one of the CMA's predecessor authorities, the Office of Fair Trading ("OFT"), may have made an IEO during a Phase 1 investigation were set out in the now superseded s.72(3) E02 as follows:

> "(3) No order shall be made under subsection (2) unless the OFT has reasonable grounds for suspecting that it is or may be the case that—
>
> (a) a relevant merger situation has been created; and
>
> (b) pre-emptive action is in progress or in contemplation."

11. By comparing the former s.72(3) EA02 with the current s.72(1) EA02, it can be seen that s.30 ERRA 2013 removed the requirement that, in order to make an IEO, the competition authority (at that time the OFT) must have reasonable grounds for suspecting at the early stage of its investigation that pre-emptive action is in progress or in contemplation. The current position is that the CMA may make an IEO when it is considering whether to make a Phase 2 reference, if it has reasonable grounds for suspecting that it is or may be the case that two or more enterprises have ceased to be distinct or that arrangements are in

progress or in contemplation which, if carried into effect, will result in two or more enterprises ceasing to be distinct.

12. The Explanatory Notes explain, in respect of the changes implemented by s.30 ERRA 2013:

> "232. This section strengthens the interim measures powers available to the CMA by making it easier for the CMA to suspend the integration of companies involved in a merger during a Phase 1 investigation. It is intended to provide a solution to the current difficulties that the OFT and CC face in reviewing and dealing with the effects of completed mergers.
>
> 233. This section changes the mechanism through which, at Phase 1, the CMA can prevent pre-emptive action from taking place in completed and anticipated mergers. At the moment, in completed mergers, merging parties are often unwilling to sign up to initial undertakings (permitted by section 71 of the EA 2002 and referred to colloquially as "hold separates") until they have agreed with the OFT derogations from its standard template undertakings. This process can take time and integration can continue until undertakings are in place. This section enables the CMA to pause integration of companies involved in a merger immediately and then consider with the parties whether any further integration should be allowed through derogations."

13. Pursuant to s.120(1) EA02, any person aggrieved by a decision of the CMA under Part 3 of the EA02 in connection with a reference or possible reference in relation to a relevant merger situation may apply to the Competition Appeal Tribunal ("the Tribunal") for a review of that decision. Pursuant to s.120(2)(b) EA02, "decision" in the context of s.120(1) EA02 "*includes a failure to take a decision permitted or required by [Part 3 EA02] in connection with a reference or possible reference*".

14. When determining an application made pursuant to s.120(1) EA02, the Tribunal shall apply the same principles as would be applied by a court on an application for judicial review (see s.120(4) EA02). The Tribunal may dismiss the application or quash the whole or part of the decision to which it relates. Where the Tribunal quashes the whole or part of the decision, the Tribunal may refer the matter back to the CMA with a direction to reconsider and make a new decision in accordance with the ruling of the Tribunal (see s.120(5) EA02). Unless directed to the contrary by the Tribunal, the effect of the CMA's decision is not suspended by reason of the making of the application for a review of the decision (see s.120(3) EA02).

C. LEGAL PRINCIPLES

(1) Pre-emptive action

15. The concept of pre-emptive action was considered by the Tribunal recently in *Electro Rent Corporation v Competition and Markets Authority* [2019] CAT 4 ("*Electro Rent*") in respect of an interim order made by the CMA pursuant to s.81 EA02 during a Phase 2 investigation of a completed merger. As regards s.81 EA02, s.80(10) EA02 defines pre-emptive action as "*action which might prejudice the reference concerned or impede the taking of any action under [Part 3 EA02] which may be justified by the CMA's decisions on the reference*". The Tribunal in *Electro Rent* referred at [118] to *Intercontinental Exchange, Inc. v Competition and Markets Authority* [2017] CAT 6 ("*ICE*") where the Tribunal observed in respect of an IEO made by the CMA pursuant to s.72 EA02:

> "220. […] "pre-emptive action" is a broad concept. It concerns conduct which might prejudice the reference or which might impede action justified by the CMA's ultimate decision. The IEO in these proceedings is phrased in similarly broad language and should be interpreted to give full effect to its legitimate precautionary purpose. […] The word "might" means that it is the possibility of prejudice to the reference or an impediment to justified action which is prohibited. The IEO catches more than just actual prejudice or impediments, which is why the onus is on the addressee of the IEO to seek consent from the CMA if their conduct creates the possibility of prejudice or an impediment."

16. It is noted that, as regards an interim order made under s.82 EA02, the Tribunal previously held in *Stericycle International LLC v Competition Commission* [2006] CAT 21 ("*Stericycle*"):

> "129. Section 81 gives the CC wide powers for the purpose of preventing pre-emptive action […]. Moreover, the word "might" used in section 80(10) implies a relatively low threshold of expectation that the outcome of the reference might be impeded. At the time the CC is considering whether to exercise its powers under section 81, it necessarily cannot be sure whether any action being taken (or proposed) by the merging/merged parties will ultimately impede any action being taken by the CC as a result of the reference. The power under section 81 enables the CC to intervene where it considers that there is at least some risk of that happening.
>
> 130. While we accept that the CC must exercise its powers reasonably and proportionately, we also accept that the CC has a considerable margin of appreciation under section 81: see also *Somerfield* at paragraph 88. Similarly, since the outcome of a reference may well require a remedy to restore the status quo ante (see e.g. *Somerfield*, at paragraphs 94 to 100), when exercising its

> powers under section 81 the CC may properly have regard to the need to safeguard the effectiveness of any divestiture that may ultimately be ordered (see also paragraph 4.23 of the CC's guidance Merger references CC2, June 2003)."

(2) Standard of review

17. Pursuant to s.120(4) EA02, the Tribunal shall determine this Application by applying the same principles as would be applied by a court on an application for judicial review. The Tribunal stated recently in *Ecolab Inc. v Competition and Markets Authority* [2020] CAT 12 ("*Ecolab*") at [58] that the approach to be adopted in applications for judicial review on rationality grounds is summarised in *BAA Limited v Competition Commission* [2012] CAT 3 ("*BAA*"). *BAA* concerned a judicial review under s.179 EA02 of a decision of the Competition Commission ("CC") on a market investigation but the approach is the same as for an application for judicial review under s.120 EA02. The Tribunal in *BAA* stated at [20]:

> "(3) The CC, as decision-maker, must take reasonable steps to acquaint itself with the relevant information to enable it to answer each statutory question posed for it […]. The CC "must do what is necessary to put itself into a position properly to decide the statutory questions": *Tesco plc v Competition Commission* [2009] CAT 6 at [139]. The extent to which it is necessary to carry out investigations to achieve this objective will require evaluative assessments to be made by the CC, as to which it has a wide margin of appreciation as it does in relation to other assessments to be made by it: compare, e.g., *Tesco plc v Competition Commission* at [138]-[139]. In the present context, we accept Mr Beard's primary submission that the standard to be applied in judging the steps taken by the CC in carrying forward its investigations to put itself into a position properly to decide the statutory questions is a rationality test: see *R (Khatun) v Newham London Borough Council* [2004] EWCA Civ 55; [2005] QB 37 at [34]-[35] and the following statement by Neill LJ in *R v Royal Borough of Kensington and Chelsea, ex p. Bayani* (1990) 22 HLR 406, 415, quoted with approval in *Khatun*:
>
> > "The court should not intervene merely because it considers that further inquiries would have been desirable or sensible. It should intervene only if no reasonable [relevant public authority – in that case, it was a housing authority] could have been satisfied on the basis of the inquiries made."
>
> (4) Similarly, it is a rationality test which is properly to be applied in judging whether the CC had a sufficient basis in light of the totality of the evidence available to it for making the assessments and in reaching the decisions it did. There must be evidence available to the CC of some probative value on the basis of which the CC could rationally reach the conclusion it did: see e.g. *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 1 WLR 1320, 1325; *Mahon v Air New Zealand* [1984] AC 808; *Office*

> *of Fair Trading v IBA Health Ltd* [2004] EWCA Civ 142; [2004] ICR 1364 at [93]; *Stagecoach v Competition Commission* [2010] CAT 14 at [42]-[45]."

18. The Tribunal also observed in *Ecolab* at [59] the Tribunal's approach in *BAA* regarding BAA's complaint that the CC's requirement that it should sell Stansted airport was a disproportionate interference with BAA's property rights under Article 1 of Protocol 1 to the European Convention on Human Rights ("A1P1"). The Tribunal stated in *BAA* at [20]:

> "(5) In some contexts where Convention rights are in issue and the obligation on a public authority is to act in a manner which does not involve disproportionate interference with such rights, the requirements of investigation and regarding the evidential basis for action by the public authority may be more demanding. Review by the court may not be limited to ascertaining whether the public authority exercised its discretion "reasonably, carefully and in good faith", but will include examination "whether the reasons adduced by the national authorities to justify [the interference] are 'relevant and sufficient'" (see, e.g., *Vogt v Germany* (1996) 21 EHRR 205 at para. 52(iii); also *Smith and Grady v United Kingdom* (1999) 29 EHRR 493, paras. 135-138). However, exactly what standard of evidence is required so that the reasons adduced qualify as "relevant and sufficient" depends on the particular context: compare *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532 at [26]-[28] per Lord Steyn. Where social and economic judgments regarding "the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken" are called for, a wide margin of appreciation will apply, and – subject to any significant countervailing factors, which are not a feature of the present case – the standard of review to be applied will be to ask whether the judgment in question is "manifestly without reasonable foundation": *James v United Kingdom* (1986) 8 EHRR 123, para. 46 (see also para. 51). Where, as here, a divestment order is made so as to further the public interest in securing effective competition in a relevant market, a judgment turning on the evaluative assessments by an expert body of the character of the CC whether a relevant [adverse effect on competition ("AEC")] exists and regarding the measures required to provide an effective remedy, it is the "manifestly without reasonable foundation" standard which applies. One may compare, in this regard, the similar standard of review of assessments of expert bodies in proportionality analysis under EU law, where a court will only check to see that an act taken by such a body "is not vitiated by a manifest error or a misuse of powers and that it did not clearly exceed the bounds of its discretion": Case C-120/97 *Upjohn Ltd v Licensing Authority* [1999] ECR I-223; [1999] 1 WLR 927, paras. 33-37. Accordingly, in the present context, the standard of review appropriate under [A1P1] and section 6(1) of the [Human Rights Act 1998] is essentially equivalent to that given by the ordinary domestic standard of rationality. […]"

19. As regards the ordinary domestic principles of judicial review and the proportionality test under A1P1, the Tribunal stated in *BAA* at [20]:

> "(6) It is well-established that, despite the specialist composition of the Tribunal, it must act in accordance with the ordinary principles of judicial

review: see *IBA Health v Office of Fair Trading* [2004] EWCA Civ. 142 per Carnwarth LJ at [88]-[101]; *British Sky Broadcasting Group plc v Competition Commission* [2008] CAT 25, [56]; *Barclays Bank plc v Competition Commission* [2009] CAT 27, [27]. Accordingly, the Tribunal, like any court exercising judicial review functions, should show particular restraint in "second guessing" the educated predictions for the future that have been made by an expert and experienced decision-maker such as the CC: compare *R v Director General of Telecommunications, ex p. Cellcom Ltd* [1999] ECC 314; [1999] COD 105, at [26]. (No doubt, the degree of restraint will itself vary with the extent to which competitive harm is normally to be anticipated in a particular context, in line with the proportionality approach set out by the ECJ in Case C-12/03P *Commission v Tetra Laval* [2005] ECR I-987 at para. 39, but that is not something which is materially at issue in this case). This is of particular significance in the present case where the CC had to assess the extent and impact of the AEC constituted by BAA's common ownership of Heathrow, Gatwick and Stansted (and latterly, in its judgment, Heathrow and Stansted) and the benefits likely to accrue to the public from requiring BAA to end that common ownership. The absence of a clearly operating and effective competitive market for airport services around London so long as those situations of common ownership persisted meant that the CC had to base its judgments to a considerable degree on its expertise in economic theory and its practical experience of airport services markets and other markets and derived from other contexts;

(7) In applying both the ordinary domestic rationality test and the relevant proportionality test under [A1P1], where the CC has taken such a seriously intrusive step as to order a company to divest itself of a major business asset like Stansted airport, the Tribunal will naturally expect the CC to have exercised particular care in its analysis of the problem affecting the public interest and of the remedy it assesses is required. The ordinary rationality test is flexible and falls to be adjusted to a degree to take account of this factor (cf *R v Ministry of Defence, ex p. Smith* [1996] QB 517, 537-538), as does the proportionality test (see *Tesco plc v Competition Commission* at [139]). But the adjustment required is not as far-reaching as suggested by Mr Green at some points in his submissions. It is a factor which is to be taken into account alongside and weighed against other very powerful factors referred to above which underwrite the width of the margin of appreciation or degree of evaluative discretion to be accorded to the CC, and which modifies such width to some limited extent. It is not a factor which wholly transforms the proper approach to review of the CC's decision which the Tribunal should adopt".

D. INTERIM MEASURES IN UK MERGER CONTROL

20. The UK merger control system is unusual compared to the regimes of most other countries in that it is voluntary and non-suspensory in nature. It allows merging parties to self-assess whether to complete a merger without first seeking clearance from the CMA.

21. The purpose of merger control is to regulate in advance the impact of mergers on the competitive structure of markets. Within the UK's voluntary notification

regime, interim measures play a vital role in allowing the CMA to ensure that, other than certain steps taken in the ordinary course of business, a merger and the actions of merging parties do not impact the pre-merger competitive structure of the market during the period of the CMA's investigation. Preserving the competitive structure of the market is not just concerned with the ability to restore the position of the acquired and acquiring businesses in the event that the merger transaction is found by the CMA to be anti-competitive. It also includes preventing anti-competitive harm from the merger transaction impacting the position of other undertakings on any affected markets, which may be irremediably detrimental. Such undertakings could include competitors, suppliers or customers of the merging entities.

22. In the case of completed mergers, it is important that the CMA has the ability to impose interim measures quickly in the early stages of its investigation. This is particularly important in the case of completed mergers, where partial or total integration may have occurred before the CMA has called in the merger transaction for review. In such a case, any harm arising from the merger transaction may subsequently be difficult or impossible to remedy. Often, as soon as a merger transaction has been completed, steps are taken to merge what were, prior to the transaction, two separate and distinct businesses.

23. Parliament recognised the importance of the CMA's ability to move quickly in the early stages of a merger investigation to suspend the integration of companies involved in a merger following a consultation that began in 2011. As noted at [10]-[12] of this judgment, one of the legislative reforms implemented by the ERRA 2013 was to strengthen the interim measures powers available to the CMA. This was achieved by making it easier during a Phase 1 investigation for the CMA to pause the integration of companies involved in a completed merger immediately and then consider with the parties whether any further integration should be allowed through derogations.

(1) Interim measures

24. Pursuant to s.72 EA02, interim measures at the early stages of a CMA investigation can comprise the making of an IEO, the appointment of a

monitoring trustee ("MT"), the appointment of a hold separate manager ("HSM") and/or issuing an unwinding order. In practice it is not often the case that the CMA considers it necessary to issue an IEO and require the appointment of both an MT and an HSM. The CMA's guidance '*Interim measures in merger investigations*' (CMA 108) ("the Interim Measures Guidance") recognises at paragraph 1.8 that it will act proportionately in imposing interim measures, whilst having regard to the necessity of preventing pre-emptive action which might prejudice the outcome of a reference or impede the taking of any appropriate remedial action. What is necessary to achieve this in each case is judged on the basis of the facts available to the CMA at any given time. As the CMA's understanding and analysis evolves in a particular case, it may be prepared to relax some of the interim measures requirements or it may consider it necessary to impose further interim measures. The Interim Measures Guidance notes at paragraph 3.21 that where integration has completed prior to interim measures coming into force, the CMA has the power to issue an unwinding order to require integration to be unwound if it judges it necessary to preserve its ability to pursue its investigation and/or to implement effective remedies.

25. The CMA has developed a template IEO, which it updates from time to time. According to the CMA, the template IEO targets actions that may be taken by merging parties which, based on the CMA's experience, are inherently most likely to give rise to concerns about pre-emptive action.

26. The Interim Measures Guidance explains at paragraph 2.26 that, at Phase 1, an IEO has a precautionary purpose and that the CMA would normally impose an IEO in completed merger cases which it is investigating, given the immediate risk of pre-emptive action. The only exceptions to this approach are likely to arise where the CMA has been provided with compelling evidence that demonstrates that there is no risk of pre-emptive action or there are self-evidently no competition concerns.

27. Paragraph 2.29 of the Interim Measures Guidance further explains that, given the need to impose an IEO quickly in completed mergers, any IEO imposed in these circumstances will almost always take the form of the standard template.

Discussions over the scope of an IEO in completed mergers will almost always concern derogations from, rather than amendments to, the template IEO. This approach is intended to ensure that effective IEOs can be put in place as quickly as possible and to provide greater factual and legal certainty around the initial scope of an IEO. The power to grant derogations is an important and necessary safeguard against, what may transpire on fuller information than is immediately available at the time of issue, to be unnecessarily wide and burdensome restrictions on businesses, which are the subject of the IEO.

28. Paragraph 2.30 of the Interim Measures Guidance states that, in completed mergers, the CMA will, where practicable, consider submissions on derogations from the merging parties before imposing an IEO. Merging parties are encouraged to engage with the CMA as early as possible for this purpose. Where the merging parties have clearly demonstrated that some of the provisions are not relevant to a specific merger, the CMA will publish a derogation. Where the CMA is unable to establish that a derogation is justified (e.g. because there is insufficient time available to review the merging parties' submissions or because insufficient information has been provided to support the derogations requested), an IEO may be imposed without prior discussion of possible derogations. Therefore, the CMA "*encourages the merging parties to provide fully specified, reasoned and evidenced submissions to facilitate early discussions if the merging parties consider it necessary to have derogations in place on completion*".

(2) Derogations

29. The encouragement to make early and full submissions is repeated and supplemented with examples at paragraph 3.2 of the Interim Measures Guidance, which provides, in respect of derogation requests:

> "Merging parties should engage early with the CMA to discuss potential derogation requests that are considered urgent and necessary by the merging parties. Derogations are more likely to be granted if requests are fully specified, reasoned and supported by relevant evidence, including, for example:
>
> (a) a full and detailed explanation of the action the merging party wishes to take. For example, terms such as 'integration planning' should be explained

> fully in terms of what business functions any integration planning will cover; what types of information would be shared (and with whom);
>
> (b) the relevant provisions of the Interim Measures against which the derogation request is made;
>
> (c) why the derogation request is being made – the purpose of the derogation should be as detailed and clear as possible;
>
> (d) why the action proposed does not amount to pre-emptive action;
>
> (e) a full description of any proposed safeguards (eg non-disclosure agreements or limits on the actions that the merging parties can take under the derogation) to ensure that the action proposed does not create any risk of pre-emptive action;
>
> (f) why the action proposed would not be difficult or costly to reverse;
>
> (g) whether the derogation request is urgent (and if so, how urgent it is and why it is strictly necessary to safeguard the viability and competitive capability of the target business in advance of the CMA's decision on the merger);
>
> (h) proposed draft text for the derogation consent letter based on the CMA's standard derogation request template (as amended from time to time), which is available on the CMA's website; and
>
> (i) any other information which may assist the CMA in considering the request. More detail is provided in the sections below regarding additional information that may be required based on the type of derogation request being sought."

30. Paragraph 3.5 of the Interim Measures Guidance explains that, where the CMA's fact-finding remains at an early stage, the CMA is likely to adopt a cautious approach to granting derogations, which are typically narrow and closely calibrated to the justifications provided by the merging parties. The CMA will take into account the particular circumstances of the case when assessing the risks of pre-emptive action. Derogations granted by the CMA in previous cases may not apply to all future cases (see Interim Measures Guidance paragraph 3.24). The CMA is entitled to take a cautious approach in dealing with derogations. It may often be only once the CMA has developed an understanding of the businesses, competition issues and implications arising from a merger that it is in an informed position to assess the potential risks and impact of any requested derogations.

31. The Interim Measures Guidance states at paragraph 3.1 that derogations will not be given retrospectively to approve actions that have already occurred and that

may be in breach of interim measures, nor does the giving of a derogation preclude the CMA from taking action against any steps that were in breach of the interim measures prior to the derogation having been granted. The Interim Measures Guidance reminds merging parties at paragraph 3.7:

> "When considering whether a derogation should be requested, merging parties should note that it is of the utmost importance that Interim Measures be scrupulously complied with, and that a merging party should not itself form judgements or reach decisions that are properly for the CMA. Pre-emptive action is a broad concept. It concerns conduct which might prejudice the reference or which might impede action justified by the CMA's ultimate decision. The word 'might' means that it is the possibility of prejudice to the reference or an impediment to justified action which is prohibited. Interim Measures catch more than just actual prejudice or impediments, which is why the onus is on the addressee of the Interim Measure to seek consent from the CMA if their conduct creates the possibility of prejudice or an impediment."

32. Paragraph 3.8 of the Interim Measures Guidance further explains that merging parties that are subject to interim measures may make submissions to the CMA setting out reasons why there is no longer a risk of pre-emptive action. The CMA will consider whether it would be appropriate to vary, revoke or release the interim measures. Given the precautionary purpose of interim measures, the CMA would expect to vary, revoke or release interim measures only where it has seen compelling evidence that the risk of pre-emptive action no longer arises. Paragraph 3.22 notes that the standard form interim measures allow, without the need for a derogation, action taken "*in the ordinary course of business*" and defines this as:

> "matters connected to the day-to-day supply of goods and/or services by each of the merging parties. It does not include matters involving significant changes to their respective organisational structure or to the post-merger integration of the merging parties or the whole or parts of their businesses".

33. Under the section headed 'Guidance on more complex derogations', the Interim Measures Guidance explains the following:

> "**Parts of one merging party's business that are not engaged in activities related to the other merging party's business**
>
> 3.43 In some cases, the CMA may be willing to grant derogations where it is clear that certain parts of the target business's activities are not related to those of the acquiring business. A derogation on this basis will only be granted where the CMA is able to establish clearly that this will not impede the CMA from taking any appropriate remedial action that might be required. For this reason, the CMA is likely to be particularly cautious about granting derogations on this

basis at the earlier stages of its investigation where the full scope of the merging parties' activities may not yet have been fully analysed.

3.44 Merging parties requesting derogations on this basis will be required to delineate clearly the parts of the merging parties' businesses that respectively do, and do not, engage in activities related to each other. Derogation requests should therefore include clear descriptions of all relevant businesses, along with their functions and reporting lines. To this end, merging parties should be able to show, in particular, that:

(a) the viability or competitive capability of the 'related' business (which will remain subject to the Interim Measure) is not dependent on the 'non-related' business (for which a derogation is sought);

(b) staff from the 'related' business do not interact with staff from the 'non-related' business, nor do staff have dual responsibilities in respect of both the 'related' and 'non-related' businesses;

(c) the tangible and intangible assets (including intellectual property rights) of the 'related' business, are not also used by the 'non-related' business;

(d) there are no customers and/or supplier contracts/relationships which are common to both the 'related' and 'non-related' businesses;

(e) the provision of back-office support functions (eg accounting, legal, HR, procurement) to the 'related' and 'non-related' businesses does not give rise to a risk that commercially-sensitive, confidential or proprietary information of the 'related' business can flow back to the 'non-related' business;

(f) the 'related' and 'non-related' businesses operate on separate IT systems or that shared IT systems are otherwise capable of being effectively ring-fenced;

(g) there are, in practice, no other material links between the 'related' business and the 'non-related' business including, for example, that the services provided by these businesses are not purchased together by customers; and

3.45 In certain cases, the CMA has granted derogation requests (where sufficiently specified, reasoned, and evidenced) in relation to:

(a) *Non-overlapping businesses*: for example, where an investment company (or other multi-product company) has holdings in businesses active across multiple industries, it may be clear at a relatively early stage of the case that many of the businesses in which the acquiring business holds an interest are not active in (and could not enter) any markets relevant to the target business.

(b) *Non-overlapping sites*: for example, where the CMA is conducting a local area analysis (eg in a retail merger case) and there are no wider (eg national) effects, it may be possible, as the CMA's investigation develops, to grant derogations exempting specific non-overlapping sites.

(c) *Non-overlapping products*: for example, as the CMA's investigation develops, it may be possible to grant derogations exempting businesses that

are active only in relation to products/services in which the CMA has been able to dismiss possible competition concerns.

3.46 While the examples described above relate to circumstances in which there is no horizontal overlap between the merging parties, the CMA will also take any potential vertical relationships between the merging parties' activities into account when assessing whether derogations can be granted on this basis. As mentioned in paragraph 3.43, the CMA is likely to be particularly cautious about granting these types of derogations at the earlier stages of its investigation.

3.47 Where integration is permitted in relation to only part of the merging parties' business, the Interim Measures will generally prevent staff from the parts of the business that remain subject to the Interim Measures from contacting former colleagues who are no longer subject to the Interim Measures. Such contacts should also be subject to procedural safeguards (such as those described in paragraphs 3.15 to 3.16 above).

3.48 Merging parties requesting derogations on this basis should be able to show (supported by relevant evidence) why such contacts are strictly necessary (eg to fulfil existing customer agreements or maintain existing customer relationships). Such contacts should also be subject to procedural safeguards (such as those described in paragraph 3.15 to 3.16 above)."

34. The next section of the Interim Measures Guidance is headed 'Derogation requests that are unlikely to be granted by the CMA'. Paragraph 3.63 explains that the CMA will typically not grant a derogation request unless it can be shown that the proposed derogation is (a) strictly necessary to safeguard the viability and competitive capability of the target business; (b) both urgent and necessary in advance of the CMA's decision on the merger; and (c) clearly unlikely to have any impact on the CMA's ability to achieve effective remedies. Paragraph 3.64 elaborates that the fact that integration could subsequently be unwound should a divestment remedy be required, is not, by itself, sufficient to justify a derogation. This is primarily because of the risk that information obtained and/or actions taken by the acquiring business could impact negatively on competition between the merging parties if the merger were to be ultimately prohibited. It could also undermine potential remedies if remedies were found to be necessary.

35. Paragraph 3.66 of the Interim Measures Guidance reiterates that the CMA's decision on a derogation request will be guided not only by the impact that the proposed derogation could have on the CMA's ability to achieve effective remedies, but also by the strict necessity of measures to safeguard the viability and competitive capability of the target business.

E. FACTUAL BACKGROUND

36. Facebook is a corporation established under the laws of Delaware, USA, and is a publicly traded company on NASDAQ with its headquarters in California, USA. It has more than 250 subsidiaries across the globe. Facebook UK is a company incorporated in England and Wales.

37. Facebook offers a range of products and services, which includes Facebook itself, Instagram, Messenger, WhatsApp, Oculus, Portal, Workplace and many others.

38. GIPHY operates an online database and search engine that primarily allows users to search and share GIFs (Graphic Interchange Format image files) and GIF stickers (GIFs with transparency around the edges, hereafter "stickers"). GIPHY's library of GIFs and stickers is provided to users directly through its website and app, and indirectly through an API (Application Programming Interface) which enables users of third party apps – such as Snapchat, TikTok or Instagram – to access the library from those apps and to share from the library with other users of their apps.

39. On 15 May 2020, Facebook purchased GIPHY. The transaction was structured as a merger with Tabby Acquisition Sub, Inc. ("Tabby Acquisition"), which is a wholly-owned direct subsidiary of Facebook ("the Transaction"). Facebook did not, and was not required to, make merger control filings in the UK or any other jurisdiction in respect of the acquisition.

40. On 29 May 2020, the CMA wrote to Facebook stating that it had not yet decided whether to investigate the completed merger and sought information about the Transaction and the respective activities of the merged entities to form a view of the Transaction.

41. On 5 June 2020, the CMA sent an enquiry letter to Facebook requiring it to supply certain documents and information relating to the merger. This letter was in the form of a "s.109 Notice", issued by the CMA pursuant to its powers of investigation under s.109 EA02.

42. On 9 June 2020, the CMA issued an IEO addressed to Facebook, Tabby Acquisition, Facebook UK and GIPHY, which commenced on the same date. The IEO provisions relevant to this Application are:

> "**Management of the Facebook and Giphy businesses until determination of proceedings**
>
> 4. Except with the prior written consent of the CMA, Facebook, Tabby Acquisition, Facebook UK and Giphy shall not, during the specified period, take any action which might prejudice a reference of the transaction under section 22 of the [EA02] or impede the taking of any action under the [EA02] by the CMA which may be justified by the CMA's decisions on such a reference, including any action which might:
>
> (a) lead to the integration of the Giphy business with the Facebook business;
>
> (b) transfer the ownership or control of the Facebook business or the Giphy business or any of their subsidiaries; or
>
> (c) otherwise impair the ability of the Giphy business or the Facebook business to compete independently in any of the markets affected by the transaction.
>
> 5. Further and without prejudice to the generality of paragraph 4 and subject to paragraph 3, Facebook, Tabby Acquisition, Facebook UK and Giphy shall at all times during the specified period procure that, except with the prior written consent of the CMA:
>
> (a) the Giphy business is carried on separately from the Facebook business and the Giphy business's separate sales or brand identity is maintained;
>
> (b) the Giphy business and the Facebook business are maintained as a going concern and sufficient resources are made available for the development of the Giphy business and the Facebook business, on the basis of their respective pre-merger business plans;
>
> (c) except in the ordinary course of business, no substantive changes are made to the organisational structure of, or the management responsibilities within, the Giphy business or the Facebook business;
>
> (d) the nature, description, range and quality of goods and/or services supplied in the UK by each of the two businesses are maintained and preserved;
>
> (e) except in the ordinary course of business for the separate operation of the two businesses:
>
> (i) all of the assets of the Giphy business and the Facebook business are maintained and preserved, including facilities and goodwill;
>
> (ii) none of the assets of the Giphy business or the Facebook business are disposed of; and

(iii) no interest in the assets of the Giphy business or the Facebook business is created or disposed of;

(f) there is no integration of the information technology of the Giphy or Facebook businesses, and the software and hardware platforms of the Giphy business shall remain essentially unchanged, except for routine changes and maintenance;

(g) the customer and supplier lists of the two businesses shall be operated and updated separately and any negotiations with any existing or potential customers and suppliers in relation to the Giphy business will be carried out by the Giphy business alone and for the avoidance of doubt the Facebook business will not negotiate on behalf of the Giphy business (and vice versa) or enter into any joint agreements with the Giphy business (and vice versa);

(h) all existing contracts of the Giphy business and the Facebook business continue to be serviced by the business to which they were awarded;

(i) no changes are made to key staff of the Giphy business or Facebook business;

(j) no key staff are transferred between the Giphy business and the Facebook business;

(k) all reasonable steps are taken to encourage all key staff to remain with the Giphy business and the Facebook business;

(l) no business secrets, know-how, commercially-sensitive information, intellectual property or any other information of a confidential or proprietary nature relating to either of the two businesses shall pass, directly or indirectly, from the Giphy business (or any of its employees, directors, agents or affiliates) to the Facebook business (or any of its employees, directors, agents or affiliates), or vice versa, except where strictly necessary in the ordinary course of business (including, for example, where required for compliance with external regulatory and/or accounting obligations or for due diligence, integration planning or the completion of any merger control proceedings relating to the transaction) and on the basis that, should the transaction be prohibited, any records or copies (electronic or otherwise) of such information that have passed, wherever they may be held, will be returned to the business to which they relate and any copies destroyed.

Compliance

6. Facebook, Tabby Acquisition, Facebook UK and Giphy shall procure that each of their subsidiaries complies with this Order as if the Order had been issued to each of them.

7. Facebook, Tabby Acquisition, Facebook UK and Giphy shall provide to the CMA such information or statement of compliance as it may from time to time require for the purposes of monitoring compliance by Facebook, Tabby Acquisition, Facebook UK and Giphy and their subsidiaries with this Order. In particular, on 23 June 2020 and subsequently every two weeks (or, where this does not fall on a working day, the first working day thereafter) the Chief Executive Officer or other persons as agreed with the CMA of each of Facebook, Tabby Acquisition, Facebook UK and Giphy shall, on behalf Facebook / Tabby Acquisition / Facebook UK / Giphy provide a statement to

the CMA in the form set out in the Annex to this Order confirming compliance with this Order.

8. At all times, Facebook, Tabby Acquisition, Facebook UK and Giphy shall, or shall procure that Giphy shall, actively keep the CMA informed of any material developments relating to the Giphy business or the Facebook business, which includes but is not limited to:

(a) details of key staff who leave or join the Giphy business or the Facebook business;

(b) any interruption of the Giphy or Facebook business (including without limitation its procurement, production, logistics, sales and employee relations arrangements) that has prevented it from operating in the ordinary course of business for more than 24 hours;

(c) all substantial customer volumes won or lost or substantial changes to the customer contracts for the Giphy or Facebook business including any substantial changes in customers' demand; and

(d) substantial changes in the Giphy or Facebook business's contractual arrangements or relationships with key suppliers.

9. Facebook, Tabby Acquisition, Facebook UK or Giphy has any reason to suspect that this Order might have been breached it shall immediately notify the CMA and any monitoring trustee that Facebook, Tabby Acquisition, Facebook UK and/or Giphy may be directed to appoint under paragraph 10.

10. […]

11. […]

Interpretation

12. […]

13. For the purposes of this Order:

[…]

'**key staff**' means staff in positions of executive or managerial responsibility and/or whose performance affects the viability of the business;

'**the ordinary course of business**' means matters connected to the day-to-day supply of goods and/or services by Giphy or Facebook and does not include matters involving significant changes to the organisational structure or related to the post-merger integration of Giphy and Facebook;

[…]"

43. On the same day, the CMA sent Facebook an integration questionnaire, requesting information on the integration steps taken by the merging parties prior to the IEO.

44. On 10 June 2020, Facebook's legal advisers, Latham & Watkins (London) LLP ("L&W"), sent a list of five urgent derogation requests to the CMA. These and the CMA's responses to the requests are considered in more detail at Section F of this judgment.

45. On 19 June 2020, the CMA issued directions pursuant to paragraph 10 of the IEO that Facebook, Tabby Acquisition, Facebook UK and GIPHY must appoint an MT. An MT was appointed on 3 July 2020 and the MT's first report was submitted to the CMA on 20 July 2020.

46. On 3 July 2020, Facebook provided the CMA with a confidential draft merger notice under s.96 EA02, which set out the details of the Transaction and the respective activities of Facebook and GIPHY.

47. On 30 July 2020, the CMA issued directions pursuant to paragraph 10 of the IEO that Facebook, Tabby Acquisition, Facebook UK and GIPHY must appoint a formal HSM without delay (and in any event by midnight on 7 August 2020) and subject to the CMA's approval. This was to ensure that the GIPHY business operates as a viable and competitive business, separately from, and independently of, the Facebook business. Alexander Magnin, the former Head of Revenue at GIPHY from 2017 to 2019, was appointed as HSM.

48. Prior to the date of the Application, Facebook submitted compliance statements on 23 June 2020, 7 July 2020, 21 July 2020, 4 August 2020 and 18 August 2020. On each of these dates, the compliance statement was accompanied by a letter from L&W, setting out a number of significant qualifications with respect to the corresponding compliance statement.

49. Up to the date of the Application, the CMA issued four s.109 Notices to Facebook seeking information and documents. The CMA has on a number of occasions suspended the statutory timetable until it was satisfied that the s.109 Notices had been properly responded to. This explains why the Phase 1 investigation had not even commenced by the time of the hearing of the Application.

F. THE DEROGATION REQUESTS

50. The L&W letter of 10 June 2020 to the CMA requested five urgent derogations and stated that a number of integration steps had already been carried out since the Transaction completed. It also stated that the Transaction was vertical, since GIPHY provides an input into Facebook's services and the merging parties are not competitors. As such, it was contended that a number of the paragraphs of the IEO "*are not applicable to the Facebook business*". It was also pointed out that the CMA's Interim Measures Guidance at paragraphs 3.43 and 3.45 note the CMA's general willingness to grant derogations for non-overlapping businesses.

51. Four of the five urgent derogation requests related to: (1) human resources and physical security matters; (2) the resumption of pre-IEO work on upgrading GIPHY's privacy protections; (3) the provision of ongoing funding by Facebook to GIPHY; and (4) Facebook's continued provision of insurance cover for the GIPHY business under the Facebook group insurance policies.

52. In respect of these four derogation requests:

    (1) After the exchange of correspondence between L&W and the CMA and the provision of further information by Facebook, a part of the first derogation request was withdrawn by Facebook on 25 June 2020 on the basis that it was no longer required, and the CMA consented to derogations to the IEO in respect of the remaining parts of the first derogation request on 26 June 2020, 16 July 2020, 27 August 2020 and 17 September 2020.

    (2) The second derogation request was put on hold around 14 July 2020 so that Facebook could consult internally on the matter to determine the most suitable approach.

    (3) Facebook withdrew the third derogation request on 25 June 2020.

(4) The CMA informed Facebook on 16 June 2020 that it was not minded to grant the fourth derogation request retrospectively in relation to activities which had already occurred pre-IEO.

53. The fifth derogation request, which is the subject of this Application, comprises derogations to the effect that paragraphs 4(b), 5(c), 5(e), 5(i), 5(k) and 8 of the IEO would no longer apply to the Facebook business and that paragraph 5(d) of the IEO would apply only to that part of the Facebook business that relates to the procurement or supply of GIFs and stickers ("the Carve-Out Requests"). L&W's 10 June 2020 letter stated:

> "Facebook requests that the obligations in each of the paragraphs of the IEO listed below no longer applies to the Facebook business on the basis that such a derogation is proportionate and in line with the aims of the IEO, particularly in circumstances where the Parties' activities do not horizontally overlap and GIPHY generates zero UK revenues (for the avoidance of doubt all obligations will continue to apply to the GIPHY business thereby preserving the CMA's remedial options):
>
> ● **Paragraph 4(b)**: Facebook is a publicly listed company and is not able to ensure its compliance with paragraph 4(b) where one or more third parties might seek to acquire control.
>
> ● **Paragraph 5(c)**: Facebook does not compete with GIPHY and any ordinary course changes to the organisational structure of its businesses, or the management responsibilities within these, cannot prejudice the CMA's remedial options in this case. In addition, the large majority of Facebook's activities are carried on outside of the UK and, therefore, the restrictions imposed on the Facebook business under this paragraph would be disproportionate to the aims pursued.
>
> ● **Paragraph 5(d)**: given the extent of Facebook's global operations, and significant business activities unrelated to the Transaction, Facebook requests that paragraph 5(d) of the IEO only applies to the Facebook business as it relates to the procurement or supply of GIFs and stickers.
>
> ● **Paragraph 5(e):** Facebook is a global business which regularly acquires assets or disposes of its existing business assets. These ordinary course activities are entirely unrelated to the CMA's investigation and the dis-application of this paragraph cannot prejudice the CMA's remedial options in this case.
>
> ● **Paragraph 5(i)**: any changes to key staff of the Facebook business cannot prejudice the CMA's remedial options in this case.
>
> ● **Paragraph 5(k)**: any changes to key staff of the Facebook business cannot prejudice the CMA's remedial options in this case.
>
> ● **Paragraph 8**: given the extent of Facebook's global operations, it requests that the reporting obligations under paragraph 8 should exclude material

> developments arising in the ordinary course of business and which do not relate to the procurement or supply of GIFs and stickers.
>
> Finally, we wanted to remind the CMA that pre-merger GIPHY and Facebook had an existing customer-supplier relationship and, as such, Facebook will continue to work with GIPHY strictly in the ordinary course of business in line with the Parties' pre-merger relationship and subject to the restrictions of the IEO." (emphasis in the original)

54. In respect of the Carve-Out Requests, the CMA responded on 12 June 2020, requesting L&W to re-submit a fully specified, reasoned and evidenced request taking into account the Interim Measures Guidance, with particular reference to paragraphs 3.40-3.56. The CMA also referred to paragraph 3.43 of the Interim Measures Guidance, which states that the CMA is likely to be particularly cautious about granting derogations carving out activities of the acquiring business from the IEO at the earlier stages of its investigation where the full scope of the merging parties' activities may not yet have been fully analysed, as well as the requirements set out at paragraph 3.44 of the Interim Measures Guidance.

55. L&W responded by email to the CMA on the same day:

> "please note that the Facebook business is global with c.50k employees and the vast majority do not interact with the GIPHY business. The IEO currently applies to Facebook, Inc. on a global basis and, as such, absent the CMA granting the derogations requested, it would be impossible for Facebook to carry on its ordinary course business activities unrelated to GIPHY or GIFs and stickers, more generally. For example, under the terms of the IEO, Facebook globally would be prohibited from changing key staff or updating customer / supplier contracts (regular ordinary course activities) and with respect to operations entirely unrelated to the transaction, e.g., virtual reality software development in the US. We assume this is not the CMA's intention. As specified in the request, the IEO would continue to apply to the GIPHY business in its entirety. This ensures that in a hypothetical worst case scenario a sale of the GIPHY business would be preserved as a remedial option. There is no corresponding business to sell on the Facebook side since its activities do not overlap with GIPHY's. In summary, by granting the derogations for the paragraphs requested, and with the restrictions specified, this cannot conceivably result in pre-emptive action or otherwise prejudice the CMA's remedial options. It simply serves to enable Facebook to carry out its unrelated (non-overlapping) business activities in the ordinary course."

56. On 15 June 2020, L&W sent the CMA a draft derogation letter, which included proposed wording for the CMA's consent to the Carve-Out Requests. Under the heading 'Non-application of paragraphs 4(b), 5(c), 5(e), 5(i), 5(k) and 8 of

the Initial Order to the Facebook Business', the draft stated "*Facebook submitted that the Facebook business and GIPHY business do not compete*".

57. On 22 June 2020 and in response to an enquiry by L&W regarding the status of the Carve-Out Requests, the CMA wrote in an email to L&W:

> "As explained on our call on 15 June, we would like to reiterate that, in line with the CMA's Interim Measures guidance (CMA108, the "Guidance"), the CMA is cautious about granting derogations which carve out activities of the acquiring business from the IEO at an early stage of its fact-finding. In particular, for the CMA to consent to remove Facebook entirely from the scope of certain provisions of the IEO, we would need to be satisfied that Facebook's activities that are in any way related to Giphy's activities, whether vertically, horizontally or in an otherwise adjacent market, would remain within the scope of the IEO. As such, we require fully specified and reasoned requests that take this into account.
>
> In addition, we would point out that paragraphs 5(c) and 5(e) of the IEO do not apply "*in the ordinary course of business*". Please can you let us know in what specific operational areas your clients require the grant of derogations which exceed this criterion and any other details necessary for the CMA to fully consider each request, including, where particular actions requiring derogations occur at regular intervals, their planned frequency.
>
> As set out in our email of 19 June, we consider that there has been substantial integration of the target business within Facebook prior to the issuance of the IEO. Taking into account that a number of other risk factors identified in paragraphs 4.5 to 4.6 of the Guidance are also present in this case (also described in our email of 19 June), we are currently not satisfied that [the Carve-Out Requests] can be granted without prejudice to the outcome of a reference or impeding the taking of any appropriate remedial action."

58. On 23 June 2020, Facebook's first compliance statement under the IEO was submitted with an accompanying letter from L&W. The L&W letter stated with respect to the Carve-Out Requests:

> "we note that the CMA is currently minded not to grant the derogation, including (without reason or justification) for those sections of the IEO where the request was recently granted in its investigation of Amazon/Deliveroo, e.g., dis-application of paragraph 4(b) of the IEO in circumstances where Facebook (like Amazon) is a public company and cannot control the buying or selling of shares in the company. Absent a derogation, the IEO currently applies to Facebook on a global basis and the restrictions in the IEO would make it impossible for Facebook to carry on its ordinary course business activities. For example, under the terms of the IEO, Facebook <u>globally</u> would be prohibited from changing key staff, its organisational structure or updating customer / supplier contracts (regular ordinary course activities) without a derogation and even with respect to operations entirely unrelated to the transaction, e.g. virtual reality software development in the U.S. This is also in circumstances where the Parties' activities do not overlap (in any economically meaningful sense) and in a hypothetical worst case scenario a sale of the GIPHY business would

be preserved as a remedial option. There is no corresponding business to sell on the Facebook side." (emphasis in the original)

59. On 25 June 2020, L&W wrote to the CMA expressing concerns that the CMA had adopted an unreasonable and disproportionate approach in applying the terms of the IEO and assessing Facebook's requests for derogations. In summary these concerns were:

(1) First, the CMA has refused to grant derogations from actions that are irrelevant to the operation of GIPHY's business, with which Facebook could not comply as a practical matter, and/or which could not conceivably prejudice the CMA's remedial options. In particular, the CMA had not explained why it believed the proposals in the Carve-Out Requests do not address the CMA's concerns, the CMA ignored the fact that Facebook had not requested a wholesale carve-out for each relevant paragraph of the IEO, and the CMA ignored the fact that the IEO will continue to apply to the GIPHY business in its entirety, thereby preserving the CMA's remedial options. Facebook considered the CMA's approach:

> "manifestly unreasonable and disproportionate in circumstances where the Parties' activities do not horizontally overlap in the UK (in any economically meaningful sense globally) and the GIPHY business generates no revenues in the UK. […] Consequently, in a hypothetical worst case scenario, in which the CMA concluded that the only effective remedy was a divestiture at the end of a Phase 2 investigation, it is only a sale of the GIPHY business that could restore the pre-merger competitive situation. There is no corresponding business to sell on the Facebook side. As such, by applying the IEO to the GIPHY business in its entirety, all of the CMA's remedial options are preserved." (emphasis in the original)

(2) Secondly, the CMA has refused to grant derogations that have been issued to merging parties in recent investigations such as *Amazon/Deliveroo* and *PayPal/iZettle*, without providing adequate (or any) explanation for the difference in treatment.

(3) Thirdly, the CMA has shown unreasonable delay in responding to Facebook's requests for derogations, including in relation to actions that are urgent and strictly necessary to ensure the ongoing viability of the GIPHY business. Facebook considered the CMA's approach neither

reasonable nor proportionate in circumstances where the CMA's remedial options are preserved, no commercially-sensitive information would be transferred to strategic or operational decision-makers, and non-disclosure agreements would prevent these individuals from transferring this information to such decision-makers within Facebook.

60. On 2 July 2020, the CMA replied to L&W, reminding them of the purpose and key principles of interim measures in UK merger control and explained the CMA's approach to requests for derogations by reference to the Interim Measures Guidance. The CMA also repeated and expanded on the reasons set out in its 22 June 2020 email in response to the three concerns set out in L&W's letter of 25 June 2020 as follows:

(1) As regards the first concern:

> "(a) The information provided by the Parties to date, in particular in response to the CMA's Integration Questionnaire, indicates that GIPHY has already been substantially integrated into the Facebook business. There is therefore no longer a clear distinction between the activities of Facebook and the pre-Merger activities of GIPHY. Taking into account that a number of other risk factors identified in paragraphs 4.5 and 4.6 of the Interim Measures Guidance are also present (as described in our email of 19 June 2020), we are currently not satisfied that this derogation request can be granted without prejudice to the outcome of a reference or impeding the taking of any appropriate remedial action.
>
> (b) The CMA is cautious about granting derogations which carve out activities of the acquiring business from the IEO at an early stage of its fact-finding. In particular, the CMA would not consent to remove Facebook (or any part of its business) from the scope of certain provisions of the IEO, unless it were satisfied that the activities of Facebook (or the relevant parts of its business) are unrelated to GIPHY's pre-Merger activities, whether horizontally, vertically, or otherwise, such that there is no prejudice to the outcome of a reference or impediment to the taking of any appropriate remedial action. The CMA does not have the necessary information at this stage of its investigation to make such a determination. This is particularly the case in circumstances where the Parties failed to respond to Questions 9 to 35 of the CMA's Enquiry Letter by the deadline of 19 June 2020 (as required under section 109 of the [EA02]), which led to the CMA stopping the four-month clock, and have to date still not provided responses to these questions or a first draft Merger Notice, with the exception of a limited submission of documents and third party contact details provided on 1 July 2020.
>
> (c) The Parties have made no attempt to provide the necessary information set out at paragraph 3.44 of the Interim Guidance Measures, instead merely submitting that the Merger does not give rise to any horizontal overlaps and that therefore Facebook does not operate a business which competes with GIPHY. We note in this context that the CMA has not excluded any particular

theories of harm at this early stage of its investigation and, even if it were to consider that there are no relevant horizontal overlaps between the Parties (which has not yet been determined), paragraph 3.46 of the Interim Measures Guidance explicitly states that the CMA will take the merging parties' vertical activities into account when assessing whether derogations, such as that requested by the Parties, can be granted.

(d) The CMA has noted that the obligations in paragraphs 5(c) and 5(e) of the IEO do not apply "*in the ordinary course of business*" and, in its email of 22 June 2020, has invited the Parties to specify operational units within Facebook which are expected to carry out activities during the duration of the investigation which exceed their respective 'ordinary course of business'. The Parties have not responded to this request.

(e) […]"

(2) As regards the second concern:

"23. […] the CMA's decision on whether or not to grant derogations is taken in line with the principles set out in the Interim Measures Guidance on the basis of the particular circumstances in each case. The CMA will continue to make clear the reasons for its decisions on particular derogation requests in relation to the Merger, but it is not bound to grant derogations requested by Facebook solely on the basis that purportedly similar derogations have been granted in previous cases.

24. As set out in more detail at paragraph 9 above, as well as in our email to the Parties' advisors of 12 June 2020, derogation requests must be fully specified, reasoned and supported by relevant evidence. Where the CMA takes the view that further information is needed in order to support the derogation request, the CMA will raise questions with the Parties on the requested derogations. The CMA is unable to grant derogation requests without the necessary information to determine whether the request meets the criteria set out in the Interim Measures Guidance. The Interim Measures Guidance notes that merging parties should expect all requests for derogations or other relaxation of interim measures to be scrutinised carefully.

25. In this context, the CMA wishes to clarify that, other than with respect to keeping Facebook signatories on GIPHY's bank accounts, it has not to date rejected any of the derogations requested by the Parties. Rather, the CMA has extensively engaged with the Parties to try to obtain sufficient information and has provided detailed feedback where the information provided by the Parties is insufficient to allow it to form a view on whether a derogation request is required or should be granted."

(3) As regards the third concern:

"27. The CMA strongly disagrees with the assertion that it has shown unreasonable delay in responding to Facebook's requests for derogations. As is set out in further detail below, the CMA is of the view that any delay in the consideration of derogation requests is entirely the result of the failure of the Parties to provide fully specified, reasoned and evidenced submissions in relation to such derogations, despite numerous requests from the CMA for the Parties to do so.

28. […]

29. […]

30. The Parties have consistently failed to provide the necessary information and evidence despite the CMA's frequent and detailed explanations and requests (often within short timeframes and outside business hours, particularly where the Parties stressed the urgency of the request). […]

31. The Parties have also provided conflicting information as to the urgency of certain derogation requests. […]

32. Furthermore, despite the CMA's requests for consolidated derogation requests, the Parties have continued to drip-feed submissions to the CMA without any indication as to whether a particular submission was complete or whether further information could be expected. As noted in the Interim Measures Guidance, drip-feeding multiple derogation requests can unnecessarily hamper the CMA's investigation."

61. On 9 July 2020, the CMA sent an email to L&W, referring to compliance statements provided on behalf of the Applicants and GIPHY certifying full compliance with the IEO between 24 June and 7 July 2020 and the accompanying letter of 7 July 2020 from L&W. The CMA noted that the compliance statements appear to contradict information provided by the accompanying L&W letter. The CMA noted that the L&W letter referred to limitations in the Applicants' compliance although no derogation had been granted by the CMA to limit the application of the relevant IEO provision in that way.

62. On 21 July 2020, L&W wrote to the CMA in a 'letter before action' that the Applicants consider the CMA's practical refusal to grant the Carve-Out Requests as an unreasonable, disproportionate and unlawful exercise of its powers, and set out six reasons explaining their view. In summary, these were:

(1) The CMA has acted *ultra vires* because, in applying the IEO, the CMA has sought to prohibit actions that cannot conceivably prejudice the CMA's reference or remedial options.

(2) The CMA has applied a template IEO without providing any meaningful derogations therefrom, in circumstances where the merging parties' activities are vertically linked and there is no corresponding acquirer

business to sell in a worst-case scenario ordered divestiture at the end of a Phase 2 investigation.

(3) The CMA has failed to have regard to the territorial limits of its powers or principles of international law because the CMA can only impose interim measures on parties' conduct outside the UK where that conduct impacts their activities in the UK and where it might result in pre-emptive action in the particular circumstances of the case.

(4) The CMA has sought to extend the IEO to Facebook's entire business on a global basis despite adopting a more reasonable, limited approach in prior cases, without providing an explanation for this difference in treatment.

(5) The CMA has misapplied its own guidance.

(6) The CMA has required Facebook to submit fortnightly compliance statements in circumstances where it is not possible to verify compliance with the unreasonably broad and global scope of the IEO template on any reasonable or proportionate basis.

63. The L&W letter requested that, by 27 July 2020, the CMA takes a decision on the Carve-Out Requests and explains whether the CMA considers Facebook's approach to compliance certification to be a breach or at least potentially a breach of the IEO absent such derogations being granted.

64. On 23 July 2020, the CMA emailed L&W stating that the 21 July 2020 letter did not explain why L&W considered the points to be so urgent as to require a response by 27 July 2020. The CMA did not consider the request for a response by 27 July 2020 to be reasonable and said "*we will of course continue to engage with the Parties on their derogation requests (including the Carve-Out Derogation Request) in the meantime and will respond to the points raised in your letter in due course*".

65. On 30 July 2020, the CMA wrote to L&W communicating its final decision on the appointment of an HSM and the CMA's reasons. In the same letter, the CMA said that the reference in L&W's 21 July 2020 letter to the CMA's 'refusal' to make a decision on the Carve-Out Requests was a mischaracterisation: the CMA had not refused to make a decision on the request and the CMA still did not have the necessary information to grant the Carve-Out Requests.

66. In a subsequent letter on 7 August 2020, the CMA responded to L&W's 21 July 2020 letter. The CMA noted its significant concerns about Facebook's lack of co-operation with the CMA's merger investigation and set out an expanded explanation of the purpose and applicable legal framework for interim measures and the granting of derogations, referencing the Interim Measures Guidance. The CMA emphasised that it had not refused the Carve-Out Requests and stated that, in light of the broad nature of the Carve-Out Requests, the continuing absence of the information and evidence it requested from Facebook and having regard to the Interim Measures Guidance, the CMA remained unable to fully consider the Carve-Out Requests. Among the detailed and specific responses set out in the CMA's lengthy letter, we note the following in particular:

> "31. The Interim Measures Guidance further explains that the CMA may be willing to grant derogations where it is clear that certain parts of the target business's activities are not related to those of the acquiring business. Derogations on this basis will only be granted in circumstances in which the CMA is able to establish clearly that this will not impede the CMA from taking any appropriate remedial action that might be required. The CMA is likely to be particularly cautious about granting derogations on this basis at the earlier stages of its investigation where the full scope of the merging parties' activities have not yet been fully analysed. The Interim Measures Guidance explains that parties requesting derogations on this basis will be required to delineate clearly the parts of the merging parties' businesses that respectively do, and do not, engage in activities related to each other, and provide clear descriptions of all relevant businesses, along with their functions and reporting lines. […]
>
> […]
>
> 35. As noted above, the conditions for the imposition of an IEO are set out in section 72(1) of the [EA02]. In the present case, as the CMA is considering whether to make a reference under section 22 of the [EA02] and has established reasonable grounds for suspecting that it is or may be the case that two or more enterprises have ceased to be distinct, those conditions are clearly met. The CMA's powers under section 72(2) of the [EA02] are therefore engaged. There is no requirement for the CMA to identify any particular substantive competition concerns before imposing an IEO. In any case, as explained in the

30 July Letter, the CMA is still in the early stages of its Merger investigation and does not yet have sufficient evidence to rule out horizontal concerns.

[…]

48. At this early stage of its investigation, the CMA has not been able to determine that granting the Carve-out Derogation Request would not result in pre-emptive action. This is due to: (i) the integration of the GIPHY business within the Facebook business prior to the imposition of the IEO and Facebook's failure to provide complete and accurate information to the CMA on the extent of this integration, (ii) the broad and unspecified nature of the Carve-Out Derogation Request, which relates either to the entirety of the Facebook business or to the entirety of Facebook's business except as it relates to the procurement or supply of GIFs and stickers, (iii) the vague basis on which the Carve-out Derogation Request is being made, and (iv) the fact that the CMA is still at any early stage of its investigation, which has been hindered by Facebook's persistent failure to cooperate and to respond to the CMA's mandatory information requests (as discussed above).

[…]

59. With regard to Facebook's submissions that the CMA has set an impossible bar for obtaining any derogation, the CMA would re-emphasise that, in light of the information asymmetries between the CMA and the Parties, the onus is on the Parties to provide sufficiently specified, reasoned, and evidenced derogation requests. Where a derogation request does not meet these requirements, as with the Carve-out Derogation Request, the CMA will not be able to properly assess whether granting such a derogation may result in pre-emptive action. The CMA does not consider that these requirements result in an impossible bar in obtaining any derogations from the IEO. Indeed, the fact that the CMA has granted two derogations from the IEO demonstrates that there is no insurmountable barrier to obtaining appropriate derogations.

60. As communicated to the Parties on 22 June and again in the 2 July Letter, the information provided by the Parties to date has failed to demonstrate that the Carve-out Derogation Request meets the criteria set out in the Interim Measures Guidance. For the reasons set out above, the CMA is not satisfied that granting the Carve-Out Derogation in the wide and insufficiently specified form requested would not result in any pre-emptive action.

61. Furthermore, the CMA does not consider that Facebook has adequately explained how the Carve-Out Derogation would operate in practice. For example, in relation to those elements of the Carve-Out Derogation Request that would exclude the operation of the IEO from the entirety of the Facebook business, except as it relates to the procurement or supply of GIFs and stickers, Facebook has not explained which parts of its business would be within and outside the IEO perimeter, or the basis on which Facebook would propose to draw a distinction between the two." (emphasis in the original)

67. On 25 August 2020, L&W responded to the CMA by letter. It stated that there were certain mischaracterisations in the CMA's 7 August 2020 letter concerning Facebook's co-operation with the CMA's investigation to date. It also refuted in detail the points in the CMA's letter and informed the CMA that Facebook

would be making further and substantive representations on the CMA's *de facto* refusal to grant the Carve-Out Requests as part of its forthcoming application to the Tribunal.

G. THE APPLICATION FOR REVIEW

68. On 26 August 2020, the Applicants applied to the Tribunal for a review of the CMA's refusal to grant the derogations sought in the Carve-Out Requests. The Applicants filed two witness statements in support of the Application: from Pearl Del Rosario, the Vice President and Associate General Counsel at Facebook and Facebook's acting Chief Compliance Officer, and Alex Chung, the co-founder and current Chief Executive Officer of GIPHY.

69. In the Application, the Applicants complain that, as a result of the breadth of the key measures imposed by the IEO on the global Facebook business, it has been impossible to certify compliance with those provisions absent significant qualification, which the CMA has indicated it considers to be unacceptable and potentially in breach of the obligations under the IEO. There is accordingly a risk of incurring statutory penalties for non-compliance of up to 5% of global turnover, which in Facebook's case could amount to penalties of up to £3 billion.

70. The Applicants allege that the CMA has thus far refused to grant Facebook's Carve-Out Requests. Instead it has made requests for further information without addressing Facebook's fundamental complaint that, without the derogations sought in the Carve-Out Requests, the IEO places unreasonable compliance burdens on Facebook and is disproportionate in the scope of its application. Additionally, the CMA has failed to explain a necessary connection with the objective of interim measures.

71. The Applicants challenge the CMA's ongoing refusal to grant the Carve-Out Requests on the grounds that it is irrational, disproportionate and infringes the requirement of legal certainty. The Applicants seek an order quashing the CMA's decision and directing the CMA to grant the Carve-Out Requests or, in the alternative, remitting the Carve-Out Requests to the CMA for

re-consideration in accordance with the Tribunal's judgment. (See [82] of this judgment for an amendment to the remedies sought.)

72. The CMA filed its Defence on 24 September 2020, which was accompanied by a witness statement of Richard James Romney, a Director of Mergers at the CMA who had oversight of the CMA's investigation into the Transaction.

73. Pursuant to the Directions Order, the parties compiled a schedule itemising the outstanding information which the CMA contends it requires in order to consider the Carve-Out Requests, the Applicants' response to the CMA's contentions and the CMA's reply ("the Schedule of Outstanding Information"). This Schedule of Outstanding Information was completed and provided to the Tribunal on 25 September 2020.

74. On 9 October 2020, the Applicants filed their skeleton argument, which stood as their Reply, and three witness statements: a second witness statement of Pearl Del Rosario, a second witness statement of Alex Chung, and a first witness statement of Barbara Blank, a Director and Associate General Counsel (Competition and Regulatory) at Facebook.

75. On 15 October 2020, the CMA filed its skeleton argument.

76. Pursuant to the Directions Order, the parties filed further agreed documents on 16 October 2020 to assist the Tribunal, which included a hyperlinked chronology and a list of issues.

77. At the hearing, the Applicants provided the Tribunal with an updated annotated version of the IEO which reflected their proposals as to how the wording of various paragraphs of the IEO should be modified under the Carve-Out Requests. This is annexed to the Tribunal's judgment.

78. Before the hearing concluded, the Tribunal requested that the Applicants provide a list of Facebook's 250 subsidiaries and what they relate to ("the List of Subsidiaries") so that the Tribunal could get a sense of how Facebook operates. This List of Subsidiaries was provided to the Tribunal and the CMA

on 28 October 2020. It is not information that was before the CMA when the Carve-Out Requests were made and does not form part of the Applicants' evidence in this Application.

(1) Preliminary observations

79. In advance of the CMC, the Tribunal asked the Applicants to address whether they objected to any provisions of the Interim Measures Guidance relevant to these proceedings and to identify which paragraphs. When the Tribunal referred to this at the main hearing, Mr O'Donoghue clarified that the Applicants were not making a *vires* point in respect of the Interim Measures Guidance.

80. The Tribunal also asked the parties, in advance of the CMC, as well as in advance of the main hearing, to confirm whether there were any factual issues in dispute and to identify them. In their Notice of Application ("NoA"), the Applicants had set out certain facts, which they asserted were "*uncontroversial*". In the Defence and in Mr Romney's witness statement, the CMA disputed that the assertions made by the Applicants in their NoA were uncontroversial. The CMA explained why they are unverified assertions and, in fact, are live issues that form part of the CMA's ongoing investigation. At the hearing, the Applicants submitted that the Tribunal was not required to resolve the factual disputes to determine the Application. The CMA's position was that the Tribunal can and should conclude, on the basis of the CMA's evidence, that the Applicants' 'uncontroversial facts' are all live issues. The CMA also pointed out that the Tribunal ought not to make any express factual findings because such an approach would usurp the primary fact-finding function of the CMA in the investigation.

81. In their NoA, the Applicants seek a review of the CMA's continuing refusal to consent to the Carve-Out Requests, pointing out that a reviewable decision for the purposes of s.120 EA02 includes a failure to take a decision. In their skeleton argument, the Applicants further submit that the CMA's ongoing failure to take a decision granting their consent to the Carve-Out Requests is a *de facto* refusal of consent. The CMA's position is that it has not refused the Carve-Out Requests and it has not failed to grant them either. The CMA has

said that it requires further information in order to consider the Carve-Out Requests, and the CMA actively wishes to engage with Facebook. At the hearing, the CMA said that it is not seeking to make a technical point that there is no reviewable decision because it accepts that, in principle, if the CMA had acted irrationally in seeking the information, there would be a reviewable decision. The CMA submitted that the reviewable decision is the CMA's request for information. The CMA also submitted that it has not decided to refuse the Carve-Out Requests, it is simply not in a position to assess the risks of the Carve-Out Requests unless it is given further information.

82. The remedies the Applicants seek from the Tribunal in their NoA are set out at [71] of this judgment. The CMA submitted in its Defence that the Tribunal does not have the power under s.120(5) EA02 to substitute its own decision or direct the CMA to take a particular decision. At the hearing, Ms Demetriou added that it would not be appropriate for the Tribunal to determine the proper scope of the derogations sought by the Carve-Out Requests. The Tribunal does not have the information required to assess whether the Carve-Out Requests are appropriate or not and, if not, which alternative derogation should be granted. Furthermore, that is not the proper function of the Tribunal on a judicial review. Therefore, were the Tribunal to quash the CMA's alleged decision to refuse the Carve-Out Requests, the only further course of action open to the Tribunal would be to remit the matter to the CMA. The Applicants agreed with this point in their skeleton argument.

(2) The grounds for review

(a) Ground 1: the CMA's refusal to grant the Carve-Out Requests is irrational and disregards the statutory purpose

(i) <u>The Applicants' submissions</u>

83. In their NoA, the Applicants complained that the widely-drafted IEO was issued by the CMA on an automatic and reflexive basis in this case and was a 'cut and paste' from a single template on its website. The Applicants clarified in their skeleton argument for the hearing that their challenge is not to the CMA's

standard practice of using a template IEO, but to the CMA's maintenance of the IEO provisions in respect of which Carve-Out Requests were made. They argued that those provisions of the IEO, imposed by default, do not in this case serve the purpose of preventing pre-emptive action and so are *ultra vires*.

84. The Applicants submitted that the CMA acted irrationally by misdirecting itself in law when considering the Carve-Out Requests. They argued that, pursuant to s.72(2) EA02, the only purpose for which the CMA may make an IEO is to prevent pre-emptive action. The Applicants accepted that pre-emptive action has been interpreted as action which "might" prejudice the CMA's reference or the taking of any remedial action (see *ICE* at [220] and *Electro Rent* at [118]) and argued that the definition of pre-emptive action in s.72(8) EA02 is essentially grounded exclusively in the question of remedies. Therefore, the statutory question which the CMA should have been addressing when it considered the Carve-Out Requests was whether granting them might give rise to a risk of pre-emptive action or prejudice the CMA's remedial options if a substantial lessening of competition ("SLC") is found. At the hearing, Mr O'Donoghue argued that the CMA's correspondence shows that the CMA misdirected itself by misinterpreting the Interim Measures Guidance and looking instead at whether there are overlaps between the acquiring and target businesses. He submitted that that position was set out as the CMA's position of principle, which the CMA has not disavowed:

(1) The CMA's 12 June 2020 email reiterated:

> "in line with the CMA's Interim Measures guidance … for the CMA to consent to remove Facebook entirely from the scope of certain provisions of the IEO, we would need to be satisfied that Facebook's activities that are in any way related to Giphy's activities, whether vertically, horizontally or in an otherwise adjacent market, would remain within the scope of the IEO. As such, we require fully specified and reasoned requests that take this into account."

(2) In the CMA's 2 July 2020 letter, it stated "*the information provided by the Parties to date has failed to demonstrate that the Carve-out Derogation request meets the criteria set out in the Interim Measures Guidance*". Then the CMA described what the Interim Measures Guidance says by stating:

> "the CMA would not consent to remove Facebook (or any part of its business) from the scope of certain provisions of the IEO, unless it were satisfied that the activities of Facebook (or the relevant parts of its business) are unrelated to GIPHY's pre-Merger activities, whether horizontally, vertically, or otherwise, such that there is no prejudice to the outcome of a reference or impediment to the taking of any appropriate remedial action."

(3) The CMA stated in its 7 August 2020 letter, "*the CMA is still in the early stages of its Merger investigation and does not yet have sufficient evidence to rule out horizontal concerns*".

85. Mr O'Donoghue contended that, if the CMA's approach of looking at whether there are overlaps between the businesses were right, it would effectively mean that the CMA cannot grant derogations from its standard template at all where there are any horizontal, vertical or other overlaps, and the CMA was applying an even more demanding test than the substantive test for merger review.

86. In reply to Ms Demetriou's submissions, Mr O'Donoghue denied that the CMA was unable to form a view on the alleged risks of pre-emptive action. He submitted that, for example, the CMA's 30 July 2020 letter directing the merging parties to appoint an HSM set out the integration-related issues that it was concerned about. He argued that the CMA was able to form a view at an early stage, but it did so on an incorrect basis.

87. In his reply submissions, Mr O'Donoghue also denied Ms Demetriou's submissions relating to Facebook's Oculus and WhatsApp. Mr O'Donoghue contended that Facebook volunteered the information to the CMA regarding the alleged vertical relationship between Oculus and GIPHY. He submitted that, in any event, Oculus does not have any active relationship with GIPHY. Oculus has a contractual possibility that might enable it to use the API at some point but it is not actually using the API and has never done so. Mr O'Donoghue further argued that Ms Demetriou's reading of Ms Blank's witness statement regarding WhatsApp was misleading because Ms Blank was making a different point, which has to do with the logical connection between the Carve-Out Requests and the question of pre-emptive action. In any event, it is unsurprising that Facebook did not intend for paragraph 5(d) of the IEO to apply to the totality of WhatsApp when it is a very small part of WhatsApp that has the

facility to offer a GIF-related functionality for those users who may wish to avail of it.

88. The Applicants also submitted that the CMA got the statutory test backwards when it stated in its 7 August 2020 letter, "*At this early stage of its investigation, the CMA has not been able to determine that granting the Carve-out Derogation Request would not result in pre-emptive action*". Rather, the core test is whether the derogation would result in pre-emptive action, which would potentially adversely affect the CMA's ability to frame or implement an effective remedy if an SLC is found. Mr O'Donoghue added that the Applicants have never suggested that the CMA needs concrete theories of harm. However, the mere fact that the CMA has not yet made up its mind about a remedy that it might impose cannot mean that it is entitled to impose an over-broad template IEO that it accepts might fall outside the statutory purpose. This is particularly so if the IEO is immune from challenge because the CMA has fallen back on the information requests in order to avoid answering the very question that the statute requires it to consider. The CMA still needs to ask itself whether there is a conceivable risk of pre-emptive action and what is that risk.

89. The Applicants contended that, in reality, there is no rational justification for the CMA's refusal to consent to the Carve-Out Requests. They argued that the only relevant consideration for freezing any aspect of the Facebook business is whether it could be relevant for a remedy. Thus, the granting of the Carve-Out Requests did not depend on whether and to what extent there are any overlaps between the activities of Facebook and GIPHY. Instead, the CMA should have assessed each of the Carve-Out Requests on its individual merits by looking at each paragraph of the IEO and assessing, on the basis of each individual derogation, how such modification to the IEO would risk pre-emptive action. The Applicants argued that there was a complete failure by the CMA to examine the Carve-Out Requests or to explain why, in view of the retained provisions of the IEO, there would nonetheless be a risk of pre-emptive action.

90. According to the Applicants, the critical provision in the IEO for the purposes of preventing pre-emptive action is paragraph 4, which gives the CMA a very broad and powerful level of protection to its remedial powers by obliging the

merging parties not to take action that might lead to integration or impair their ability to compete independently. It must also be borne in mind that the merging parties are heavily monitored by both an MT and an HSM. Under the Carve-Out Requests, paragraph 4 of the IEO would be retained (subject to a small change in paragraph 4(b)) and would continue to apply to the Facebook business, and the IEO will continue to apply to GIPHY in its entirety. Furthermore, Facebook would remain subject to additional specific obligations under the IEO. These have the genuine aim of preventing pre-emptive action, such as paragraph 5(a) which requires GIPHY and Facebook to operate their businesses independently under separate brands, paragraph 5(b) which requires Facebook to maintain GIPHY as going concern, paragraph 5(l) which prohibits the sharing of commercially sensitive information and paragraphs 5(d) and 8 as these relate to Facebook's supply or procurement of GIFs and stickers on a global basis. The Applicants stressed that the Carve-Out Requests must not be read in isolation. As such, the derogation sought in respect of, for example, paragraph 5(c) of the IEO must be read in the context of paragraphs 4 and 5(d). Furthermore, the proposed form of paragraph 5(d) is a very significant concession to the CMA because the combination of paragraphs 4 and 5(d) of the IEO amounts to a significant form of protection for the CMA against any risk of pre-emptive action. The Applicants contended that, by amending the wording to include both procurement and supply of GIFs and stickers, the modified paragraph 5(d) is over-inclusive as it covers both the procurement and supply of GIFs and stickers by Facebook and not simply from GIPHY.

91. The Applicants further emphasised that the GIPHY business is being maintained as a going concern and is preserved as a saleable asset under the supervision of an HSM. They contended that, in the event the CMA finds that the only effective remedy at the end of its Phase 2 investigation is a divestiture of GIPHY, the continuing application of the IEO to GIPHY preserves the CMA's remedial options, as GIPHY can be divested in full to restore the status quo *ante*. The possibility of certain parts of Facebook's business being included as any part of the divestment package, as suggested by the CMA in Mr Romney's witness statement, does not necessitate applying the IEO to Facebook's entire business globally. The harm to the competitive structure of

the market that the CMA refers to are bare assertions as to possibilities, which are not grounded in any evidence in this case.

92. The Applicants also contended that there is no conceivable scenario in which the CMA would order the divestiture of any part of Facebook's business as a merger remedy because Facebook does not have an equivalent overlapping business with GIPHY that could be sold as part of a divestiture package. Furthermore, divestiture on the acquiring side would be unprecedented on the basis of five authorities that establish the clear legal principle that divestiture of the target is the most extreme remedial option that the CMA can impose (*Somerfield plc v Competition Commission* [2006] CAT 4 ("*Somerfield*") at [99]; *Groupe Eurotunnel S.A. v Competition Commission* [2013] CAT 30 at [395]; *British Sky Broadcasting Group plc v The Competition Commission* [2008] CAT 25 ("*BSkyB*") at [281] and [286]; *Stericycle* at [16] and *ICE* at [101]). The Applicants are not aware of any previous case in which the CMA has imposed such a remedy and, in his reply submissions, Mr O'Donoghue argued that there is a fundamental distinction between a situation where merging parties offer to engage in some divestitures on the acquirer's side in order to get the merger done and whether the CMA has the legal power to compel the acquirer to divest its assets instead of those of the target business.

93. In the Applicants' skeleton argument and at the hearing, Mr O'Donoghue criticised the pre-emptive action and the potential effects on remedies identified by the CMA, as set out in Mr Romney's witness statement. Mr O'Donoghue submitted that the points set out at paragraphs 84-87 of Mr Romney's 48-page witness statement regarding (i) the possible provision of a "*dowry*" by Facebook in the event of the divestiture of GIPHY and possible behavioural remedies, (ii) GIPHY's source code, which remains on one of Facebook's servers, and (iii) the termination of GIPHY's paid alignments were the full extent of the CMA's *ex post* engagement with the critical question of the risk of pre-emptive action and effect on remedial possibilities. However, they fail to explain by reference to each of the derogations sought and the provisions of the IEO which would be retained why, if granted, the Carve-Out Requests might give rise to pre-emptive action or why the CMA's remedial powers might be adversely affected.

94. Further, the Applicants argued that, when one engages with the alleged risks of pre-emptive action set out in Mr Romney's witness statement, they are not even rationally connected with any risk of pre-emptive action since (i) there can be no doubt that Facebook has sufficient funds and resources to provide a dowry and Mr Romney states that the CMA has a clear preference for structural remedies over behavioural ones, (ii) the CMA does not currently believe it is necessary to direct Facebook to take steps to delete the relevant metadata from GIPHY's source code from its central server and (iii) the termination of paid alignments is irrelevant because Facebook did not buy this part of GIPHY; there is no basis for requiring Facebook to reinstate something it did not buy. Furthermore, Mr Chung stated in his second witness statement that, since the Transaction was completed, GIPHY's daily user reach has grown, GIPHY is no longer entirely dependent on third party funding or investment and, absent material further investment, more likely than not, GIPHY would have been wound down in its entirety. Consequently, the Applicants contended that there is no rational link between those provisions of the IEO which are subject to the Carve-Out Requests and the statutory objective of preventing pre-emptive action, and the CMA should not maintain them.

95. In reply to Ms Demetriou's submissions that there are two limbs to the definition of pre-emptive action under s.72(8) EA02, Mr O'Donoghue contended that she did not explain what, on the CMA's case, the first limb adds to the second. Nor did she identify any case law to show that the first alleged limb adds anything substantial to the second to expand the scope of the CMA's statutory power to manipulate the market more broadly than the power to impose a final remedy to address merger-specific effects.

96. As regards the CMA's requests for information in order to consider the Carve-Out Requests, Mr O'Donoghue submitted that the CMA's information requests must be directed solely to the question of preventing pre-emptive action. Therefore, the further information requests by the CMA in this case are irrelevant in principle because the reason for them arises from the CMA's misapplied test for the existence of overlaps. No amount of information requests would change the common ground that there are vertical overlaps at least between Facebook and GIPHY. The information sought by the CMA is

irrelevant to the question the CMA should have been asking, which is whether granting the Carve-Out Requests gives rise to a risk of pre-emptive action.

(ii) The CMA's submissions

97. The CMA did not in any way criticise the merging parties for taking integration steps prior to the IEO. However, where parties do take integration steps, that obviously gives rise to an immediate risk of pre-emptive action in that the market structure may have been changed. The CMA argued that the corollary of having a voluntary non-suspensory merger regime is that there are broad IEO powers, which enable the CMA to hold the ring in terms of preserving the competitive structure of the market. That is why in most completed merger cases, the CMA will proceed by way of the standard template IEO. The CMA submitted that its use of a standard form template IEO in this case is appropriate, and that it did not impose the standard template IEO unthinkingly. Further, its imposition of the template IEO has to be considered alongside the CMA's practice of granting derogations, which is consistent with the Parliamentary intent that underpinned the legislative changes to s.72 EA02 implemented by the ERRA 2013.

98. The CMA disagreed with the Applicants' contention that it has taken an extreme position in relation to the significance of horizontal, vertical or other overlaps, or that it has misdirected itself as to the statutory test. Ms Demetriou submitted that the CMA had not said anywhere that it would not grant a derogation if there are any horizontal links; the correspondence with L&W must be seen in context. Facebook's Carve-Out Requests were premised on the merging parties not being competitors, there being no horizontal overlap between the activities of Facebook and GIPHY and the relationship between them being only vertical.

99. The CMA pointed out that Facebook's assertion that there are very few, if any, horizontal overlaps between the Facebook and GIPHY businesses, as well as the assertion that, in a hypothetical worst case scenario, a sale of the GIPHY business would be preserved as a remedial option, and there is no corresponding business to sell on the Facebook side, was repeated variously in L&W's email of 12 June 2020, the draft derogation letter sent by L&W to the CMA on 15 June

2020, L&W's letter of 23 June 2020 which accompanied Facebook's first compliance statement and L&W's letter of 25 June 2020.

100. The CMA submitted that, when faced with a request made on that basis, it had to examine whether or not Facebook was correct in its assertions and what the derogations sought by the Carve-Out Requests meant in practice. The CMA's correspondence, which the Applicants relied upon to show that the CMA misdirected itself, comprised the CMA's response to L&W's repeated assertions. In such correspondence, the CMA explained that it needed to be satisfied that there was no horizontal overlap between the parties. The CMA's 2 July 2020 letter added that, even if Facebook were right that there is no horizontal overlap, the CMA also needed to consider the nature of the vertical relationship. As regards some of the CMA's correspondence which appeared to focus on remedies, that was in response to Facebook's assertion that the worst case remedy would be the divestiture of GIPHY.

101. Ms Demetriou highlighted that no information or evidence was provided by Facebook to substantiate any of the assertions it made in this regard in the correspondence. Facebook had also formulated its Carve-Out Requests on the basis that it is necessary to distinguish those parts of its business that relate to the procurement and supply of GIFs and stickers and those which are unrelated. It is critical for the CMA to understand what Facebook understands by that distinction, what it intends by that distinction and how that maps onto Facebook's business. However, Facebook did not explain what it understood by those concepts or how that mapped onto its business. The CMA received the Carve-Out Requests at the outset of the merger enquiry, when there was a complete asymmetry of information between the merging parties on the one hand and the CMA on the other. The CMA did not know precisely what integration steps had taken place, and it had no information as to what the Facebook and GIPHY businesses comprised, how they were operated or how the market worked. It had no understanding of what Facebook meant by "*no overlap*", what was related or unrelated businesses, nor what "*the vast majority do not interact*" meant. As regards the subsequent correspondence from L&W repeating the same assertions, the CMA had no understanding of the meaning of the provisos about the Facebook business relating to the procurement or

supply of GIFs and stickers. It was outside the CMA's knowledge, for example, in what respect Facebook engages in the procurement of GIFs and stickers, which parts of the Facebook business engage in this, and how those parts of the business relate to other parts of the business.

102. The CMA accepted that the scope of the IEO needed to be refined but submitted that it would be a dereliction of its statutory functions if it simply accepted Facebook's assertions at face value and granted the wide-ranging Carve-Out Requests on that basis. Indeed, the assertions made by Facebook are precisely the type of issues that the CMA would have to investigate as part of Phase 1 by seeking evidence in order to reach a view itself. Therefore, in response to L&W's 10 June 2020 letter, the CMA's 12 June 2020 email to L&W sought reasons and some evidence for the assertions by requesting Facebook to re-submit a fully specified, reasoned and evidenced derogation request, taking into account the Interim Measures Guidance. In subsequent correspondence, the CMA repeatedly told Facebook that there was a lack of information properly to assess the Carve-Out Requests. However, Facebook did not engage with the CMA, instead repeating its assertions in subsequent correspondence without reasons or supporting evidence to substantiate them and adopting a stance in principle that it would not provide the further information, which it asserted is difficult to provide, and that it is irrational for the CMA not to grant the Carve-Out Requests even in the absence of further information. Further, because Facebook did not provide the CMA with information and did not engage in a dialogue with the CMA to work out some modified IEO, the CMA could not explore whether a narrower derogation was appropriate and discuss alternatives.

103. The CMA also accepted as a matter of principle that, if in respect of a part of the IEO it was obvious without the need of any further information that there could not be any conceivable pre-emptive action, a derogation from that part of the IEO should be granted. The CMA submitted, however, that is not the case in respect of any of the Applicants' Carve-Out Requests. Moreover, in judging whether there is conceivably any pre-emptive action, the CMA has to act in a precautionary manner at the early stages of its investigation when it does not have information and is not yet at the stage of identifying the possible theories

of harm. Further, in order to determine that there is no conceivable pre-emptive action, the CMA needs information and should not accept the assertions of the merging party or parties. Ms Demetriou submitted that the test for the Tribunal is whether, on the basis of the information asymmetry, it was irrational for the CMA to find that there was risk of pre-emptive action.

104. The CMA submitted that the need for it to seek reasoned and evidenced derogation requests, and not to take Facebook's broad assertions on trust, is illustrated by what transpired in respect of Facebook's assertions (i) as to the status of its virtual reality business, (ii) that it is not active in the supply of GIFs, and (iii) the meaning of its assurance that the IEO would continue to apply to all of Facebook's activities in the procurement or supply of GIFs and stickers. There is also a real danger that the merging parties and the CMA do not have a common understanding of what is permitted under the Carve-Out Requests, which could result in pre-emptive action being taken. The CMA referred to the following illustrations:

(1) In L&W's 23 June 2020 letter, it was said that, without the derogations in the Carve-Out Requests, the IEO applied "*even with respect to operations entirely unrelated to the transaction, e.g. virtual reality software development in the U.S.*". However, the CMA subsequently became aware from a response by Facebook to a s.109 Notice sent on 13 July 2020 that the assertion was wrong because there is a vertical relationship between GIPHY and Facebook's Workplace and Oculus business.

(2) Facebook's draft merger notice of 3 July 2020 defined GIFs to include stickers but made no mention of Facebook's sticker library. It stated that "*Facebook is not active in the provision of any of the same services as GIPHY in the UK*" and "*Facebook is not active in the supply of GIFs (at any level of the value chain)*". However, the CMA realised that Facebook appeared to operate a sticker store and self-supply with stickers. The CMA asked Facebook about this on 13 July 2020 and has received some answers in which Facebook has attempted to distinguish its stickers from the stickers provided by GIPHY.

(3) L&W's 10 June 2020 letter stated that "*Facebook requests that paragraph 5(d) of the IEO only applies to the Facebook business as it relates to the procurement or supply of GIFs and stickers*". The CMA told the Tribunal it would understand that to mean, for example, where WhatsApp has a relationship with GIPHY, the WhatsApp services would remain within the scope of the IEO. However, the CMA were surprised to learn from paragraph 17 of Ms Blank's witness statement that that was not what Facebook meant:

> "Facebook has at all times been clear that its core activities (Facebook.com, Messenger, Instagram and WhatsApp) are vertically-linked to GIPHY, but its position is that this has no rational connection to whether the Carve-Out Request could result in pre-emptive action".

105. The CMA argued that the Applicants' approach of asking whether the Carve-Out Requests "would" result in pre-emptive action fails to give effect to the legitimate precautionary purpose of interim measures, as recognised in *Stericycle* and *ICE*, and puts the threshold too high. The question is whether granting the Carve-Out Requests might prejudice the reference concerned and not whether they necessarily would do so. Furthermore, s.72 EA02 does not require the CMA to assess the risk of pre-emptive action in a granular way by identifying theories of harm and mapping the Carve-Out Requests on to them in order to demonstrate that there are concrete risks of pre-emptive action. Ms Demetriou pointed out that, during a Phase 1 investigation, the only condition imposed by s.72(1) EA02 to the CMA's power to impose an IEO for the purpose of preventing pre-emptive action is that the CMA has reasonable grounds for suspecting that there is a relevant merger situation. Notably, there is no reference in s.72 EA02 to an SLC or to the CMA believing that there may be an SLC. Even before the amendments made to s.72 EA02 by the ERRA 2013, the OFT did not need to identify an SLC. The legislation does not require the CMA to have reached a view at that early stage that there is an SLC or even to have identified any theories of harm. This is because, at Phase 1, the CMA is at the outset of the investigative process with little or no information. It is too early for the CMA to form a view on the existence or nature of an SLC.

106. The CMA also submitted that there are two limbs to the definition of pre-emptive action under s.72(8) EA02. The first limb is action *"which might*

prejudice the reference concerned", and the second limb is "*or impede the taking of any action under this Part which may be justified by the CMA's decisions on the reference*". The CMA argued that this is deliberately broad because the function of an IEO is to hold the ring in order that the CMA can effectively fulfil its statutory duties. The breadth of the definition is also found in the Tribunal's case law: *Stericycle* at [129] and *ICE* at [220].

107. The CMA submitted that it was not equipped to carry out the exercise of looking at the Carve-Out Requests by each paragraph of the IEO as the Applicants have contended because the Carve-Out Requests were neither reasoned nor explained. The CMA did not therefore have the information properly to understand what Facebook was seeking and to assess the risks of pre-emptive action. Furthermore, the CMA is not required at this early stage of its investigation to determine what the theories of harm are and engage in the kind of granular analysis contended by the Applicants. Ms Demetriou submitted that the question for the Tribunal is whether the CMA's decision that it could not assess the Carve-Out Requests without further information is lawful or unlawful, not whether some modified Carve-Out Requests which had never been put to the CMA until the hearing are appropriate. Nonetheless, to assist the Tribunal, Ms Demetriou illustrated some of the CMA's concerns regarding the Applicants' updated annotated version of the IEO:

(1) Paragraph 4(b): Without knowing more about how Facebook's business is structured, such as which subsidiary operates the sticker library or which subsidiaries deal with procurement from GIPHY and GIPHY's rivals, the CMA is not in a position to assess the risk of pre-emptive action. For example, the CMA will have to investigate whether Facebook's proposed modification to paragraph 4(b) might allow Facebook to divest itself of part of its business that is related to the procurement or supply of GIFs and stickers, which could lead to a loss of actual or potential competition or customer foreclosure.

(2) Paragraph 5(c): This raises similar points of concern for the CMA as the proposed modification to paragraph 4(b) because Facebook's proposed modification to paragraph 5(c) of the IEO seeks a blanket exemption to

Facebook to make substantive changes to the organisational structure of or the management responsibilities within the business. The CMA will have to assess whether it might enable Facebook to make such changes to a part of its business that relates to the procurement or supply of GIFs and stickers. That could give rise to pre-emptive action in the form of customer foreclosure concerns because Facebook could re-organise and restructure itself to stop procuring GIFs from GIHPY's rivals.

(3) Paragraph 5(d): The CMA contended that there is a huge lack of clarity concerning the extent or nature of Facebook's business relating to the procurement or supply of GIFs and stickers. It is also unclear to the CMA why, under the Carve-Out Requests, only paragraphs 5(d) and 8 of the IEO should continue to apply to those parts of the Facebook business which relate to the procurement or supply of GIFs and stickers whereas other parts of the IEO should not.

(4) Paragraph 5(e): The CMA will need to investigate whether, under the modified paragraph 5(e) of the IEO, Facebook could, by dissipating assets such as the sale of intellectual property rights, deteriorate its sticker library or foreclose GIPHY's rivals.

(5) Paragraphs 5(i) and 5(k): The CMA does not understand why, under Facebook's proposal to exclude the Facebook business from paragraphs 5(i) and 5(k) of the IEO whilst retaining paragraph 8(a) of the IEO, Facebook considers it should be able to keep the CMA informed of changes of key staff who join or leave but not seek permission for those changes. Further, the CMA will need to understand whether the proposed modification to paragraphs 5(i) and 5(k) would permit Facebook to remove key staff who, for example, run its sticker store or manage its relationship with GIPHY's rival, Tenor, which could lessen competition or give rise to foreclosure effects.

(6) Paragraph 8(d): The CMA contended that Facebook had not explained why there is a disparity between its being content to tell the CMA about material developments in its relationships with key suppliers and its

seeking derogations at the same time which would prevent it from making material changes to its relationships with other suppliers of GIFs and stickers.

108. The CMA disagreed with the Applicants' assertion that there is no risk of any pre-emptive action so long as the IEO applies in full to the GIPHY business. The CMA pointed out that, prior to the Transaction, Facebook dealt with GIPHY and other rival GIF providers such as Tenor. In particular, Facebook's Messenger and WhatsApp have an API with Tenor to provide GIFs. If, for example, Facebook is important for Tenor to compete on the market, Tenor could be foreclosed from the market if, post-merger and during the CMA's investigation, Facebook deteriorates its relationships with GIPHY's rivals. In such a situation, the structure of the market is changed and competition lessened. Therefore, even if GIPHY is divested after a reference is made, in the meantime harm has been caused to competition in the market.

109. The CMA contended that it has a wide range of remedial options available to it and is entitled to refrain from precluding any at this stage. The divestment of GIPHY is not the only possible remedy because the CMA has the power to order Facebook to divest its own assets and services if this were necessary to remedy an SLC. Ms Demetriou denied that the five authorities relied upon by Mr O'Donoghue establish a legal principle that the CMA could not do anything more than order divestment of the acquired business. The statutory provisions give the CMA a broad remedial duty and there is nothing in the statute that says the CMA cannot, if necessary, order divestiture of parts of the acquiring undertaking's assets, services or business. Ms Demetriou submitted that the authorities relied on by the Applicants turned on their own facts. In any event, *BSkyB* at [281], which the Applicants relied on, sets out Sky's submission, not the Tribunal's finding, and there is no finding of the Tribunal in that case that the CMA has no power to impose another remedy. Ms Demetriou also contended that *Somerfield*, which the Applicants relied on, supports the CMA rather than the Applicants. The remedy that the CC imposed in *Somerfield* was the divestiture of stores that Somerfield acquired, and Somerfield argued that that should not have been the CC's starting point as Somerfield preferred to divest four of the stores it already owned. In *Somerfield* at [99], the Tribunal

exactly recognises the point that divesting part of the acquirer's business might be a way of remedying the SLC.

110. In response to the Applicants' argument that there is no conceivable scenario in which the CMA would order the divestiture of any part of Facebook's business, Ms Demetriou submitted that it was for the Applicants to provide evidence, which they have not done, to make good that assertion. In any event, for that argument to succeed, the Applicants would need to show that it is a legal impossibility, which it is not. The CMA argued that it is entitled to have in mind the possibility that it might order Facebook to divest part of its business, to take the view that it needed to preserve the remedy of divestiture of part of the acquirer's business even without divestiture of the whole of the acquired business, and to ensure that Facebook did not take action during the investigation which might undermine that.

111. The CMA rejected the Applicants' submission that Mr Romney's witness statement was an *ex post facto* gloss to the CMA's approach to the Carve-Out Requests. Mr O'Donoghue had argued that none of the matters referred to by Mr Romney are rationally connected with any risk of pre-emptive action. In response the CMA said that Mr Romney's witness statement was not seeking to set out the CMA's case on possible theories of harm. Mr Romney makes clear at paragraph 21 of his witness statement that none of the matters asserted by Facebook is uncontroversial and, given that the CMA's investigation is ongoing, he cannot provide any definite statements or concrete views as to the CMA's position. To do so would be premature. He provides some examples, for illustrative purposes, of the types of considerations which are currently being weighed by the CMA and which illustrate why Facebook's assertions in relation to each of the issues cannot be regarded as foregone conclusions. Further, at paragraph 32 of Mr Romney's witness statement he reiterates:

> "*I explain below, at paragraphs 84-88, why Facebook's assertion that the 'worst case' or 'most comprehensive' remedy the CMA could possibly impose is a divestment of GIPHY's business is misconceived. For present purposes, the central point is that it is far too early for the CMA to know whether any remedy will be necessary or what form it would take. For that reason, its use of interim measures must necessarily take into account the wide range of potential pre-emptive harm that is possible*".

112. Referring to paragraph 84 of Mr Romney's witness statement, Ms Demetriou submitted that the Applicants' criticism of Mr Romney's evidence focused on the second limb of the definition of pre-emptive action and overlooked the first limb, namely the preservation of the competitive structure of the market to avoid the risk of a reference to Phase 2 being impeded. This could take the form of harm to Facebook's rivals by Facebook during the course of the CMA's investigation. There is also potential for such harm to be irremediable at the conclusion of a reference, for example if input or customer foreclosure occurs during the investigation, resulting in the exit of a competitor. The CMA referred to Facebook's sticker store to provide an example of a type of horizontal theory of harm that the CMA needs to investigate because it might cause harm to the competitive structure of the market and prejudice the reference. The CMA explained that it understands that Facebook operates a sticker store and was already active in the supply of stickers. Following the acquisition of GIPHY, Facebook might decide to discontinue investment in its own sticker store. However, if Facebook had plans before the Transaction to expand that part of the business, any action deteriorating it could result in a loss of actual or potential competition in the supply of GIFs and stickers.

113. The CMA contended that Facebook's stance regarding the divestment of GIPHY relates only to the second limb of the definition of pre-emptive action. However, at no stage has the CMA said it is only relying on the second limb of the definition. It is therefore inaccurate for the Applicants to present the CMA as having rejected the Carve-Out Requests on the basis of the second limb of the definition only.

114. In respect of the CMA's request for further information from Facebook, Ms Demetriou submitted that the standard of review is one of rationality and the key question for the Tribunal is whether the CMA has acted lawfully in taking the position that it requires further information to assess the Carve-Out Requests. Case law establishes that the CMA must take reasonable steps to acquaint itself with the relevant information to put itself into a position properly to decide the statutory questions. In that regard, the CMA has a very wide discretion in determining what information it requires in order to fulfil its statutory functions. The Tribunal will only intervene if the CMA has acted

irrationally: see *BAA* at [20(3)]. The CMA contended that it has not acted irrationally in this case because the CMA took reasonable steps to acquaint itself with the relevant information to enable it to answer the question.

115. Furthermore, the CMA submitted that the legislation provides for the CMA to take a precautionary approach in imposing IEOs in order to preserve the integrity of the merger reference and any remedy that might be imposed. Where a merger has already been completed and integration steps have taken place, there is a risk that the reference will be prejudiced or remedial action impeded, because there will already have been a change to the competitive dynamics of the market. Ms Demetriou referred to paragraphs 1.8 and 2.30 of the Interim Measures Guidance. She pointed out that the assessment of which interim measures are necessary to prevent pre-emptive action in each case is done on the basis of the facts available to the CMA at any given time. The reason why the CMA is unable to establish that a derogation is justified is because insufficient information has been provided to support the derogations requested. Evidence and reasoned derogation requests are key; if no facts are available to the CMA, it has to act in a precautionary way. In the absence of further information, the CMA could not understand how the Carve-Out Requests would operate in practice and was not able to examine each of the elements of the Carve-Out Requests and to determine whether each of them gave rise to a risk of pre-emptive action.

116. The CMA further contended that the reason why the Applicants assert that the information it requested is not relevant in this case is because of Facebook's assertion that this is a merger that only has vertical effects. However, that is not a conclusion that the CMA has been able to reach yet at this very early stage of its investigation and, in those circumstances, the CMA has to proceed on the basis that there may be horizontal effects.

(iii) <u>The Tribunal's analysis</u>

117. The Tribunal is mindful that the issues for consideration in this case concern an ongoing merger investigation by the CMA. Therefore, save as to note what the factual disputes are and to set out, insofar as it exists, the common ground

between the parties regarding the underlying facts in this case, the Tribunal does not, nor does it seek to, make factual determinations of the live issues in the CMA's ongoing investigation. The Tribunal agrees with the CMA that to do so would usurp the primary fact-finding function of the CMA in the investigation. In any event, it is not necessary for the Tribunal to adjudicate on and resolve these issues for the purposes of this judgment. In broad terms, the position of the parties on these issues are as follows:

(1) Prior to the imposition of the IEO, Facebook had taken steps to integrate the Facebook and GIPHY businesses. The CMA does not criticise the fact that integration steps were taken prior to the IEO. However, the degree, extent and significance of the integration are in dispute.

(2) There is a vertical relationship between the activities of Facebook and GIPHY. The scope, nature and significance of this vertical relationship is under investigation and is disputed. The existence of any horizontal overlap between the activities of Facebook and GIPHY is also under investigation and disputed.

(3) An HSM has been appointed to ensure that the GIPHY business operates separately from, and independently of, the Facebook business. The extent of GIPHY's ability to operate effectively as an independent, standalone business is disputed.

(4) The Applicants' assertions that the merger has little connection to the UK and that GIPHY does not generate revenue in the UK are not, at this stage of the investigation, accepted by the CMA. These are currently under investigation. The materiality of whether or not GIPHY generates any income in the UK is in issue between the parties.

118. As regards the preliminary question of whether there is a reviewable decision in this case, the Tribunal notes that, pursuant to s.120(2)(b) EA02, a failure to take a decision can in itself amount to a reviewable decision. In this case, Facebook made the Carve-Out Requests which have yet to be determined by the CMA. Facebook contends that it is impossible, as a practical matter, to comply with

the IEO in its current form. It is apparent from the qualified compliance statements submitted by Facebook to the CMA and the Applicants' submissions at the hearing that, pending the CMA's determination of the Carve-Out Requests and the Tribunal's judgment, at the moment, Facebook is not seeking to comply with the IEO in its current form but are complying with it on the basis of it having already been granted the Carve-Out Requests – which have yet to be granted.

119. This is an unsatisfactory state of affairs for reasons set out by the Tribunal at [158]-[159] of this judgment. The Tribunal does not express any view as to whether Facebook's chosen course of action is in breach of the IEO, but notes that the CMA has the power under s.94A EA02 to impose a penalty of up to 5% of Facebook's total global turnover for failing, without reasonable excuse, to comply with the IEO. Given this practical implication and the effect that the grant or refusal of the Carve-Out Requests could have on Facebook, as well as the time that has elapsed since the Carve-Out Requests were made, the Tribunal considers that there is a decision amenable to the Tribunal's supervisory review jurisdiction in this case. In the Tribunal's view, the reviewable decision in this case is the CMA's decision that it would not determine the Carve-Out Requests without the further information requested, or at least in the absence of sufficient further information that would enable it to assess the Carve-Out Requests on a properly informed and considered basis.

120. There is no dispute that the applicable principles in judicial review before the Tribunal are those set out in *BAA*. Accordingly, this Tribunal shall apply *BAA* in determining whether the CMA's decision not to determine the Carve-Out Requests without further information was rational. This involves consideration as to whether the CMA's request for further information was reasonable.

121. The statutory purpose of s.72 EA02 within the merger regime in the UK is, as described in the Explanatory Notes to the ERRA 2013, to confer a wide power on the CMA so as to make it easier for it to immediately suspend the integration of merging companies during Phase 1 of an investigation by imposing interim measures, from which it can subsequently consider granting derogations. The CMA is therefore right to describe the use of IEOs as precautionary.

122. In the case of completed mergers, such as the Transaction, the CMA's use of a standard template IEO to suspend the integration (or further integration) of merging entities is driven by the need to act quickly and, as the CMA submitted, to 'hold the ring' pending the outcome of the CMA's investigation. The Applicants made clear that they did not challenge the CMA's practice of using template IEOs. Their complaint concerns the CMA's maintenance of certain provisions of the template IEO in their case.

123. Under s.72(2) EA02, the CMA may make an IEO for the purpose of preventing pre-emptive action, which is defined at s.72(8) EA02. At the hearing, the parties did not dispute the approach taken by the Tribunal in *Stericycle*, *ICE* and *Electro Rent* to the concept of pre-emptive action. Accordingly, the Tribunal shall adopt the approach established by these authorities.

124. In the Tribunal's view, the statutory purpose of s.72 EA02 is wider than the Applicants have contended. The definition of pre-emptive action is not grounded exclusively in the question of remedies. It includes action which might prejudice a Phase 2 reference. As the CMA submitted, this includes action that has the potential to affect the competitive structure of the market during the CMA's investigation. This is supported by the Tribunal's jurisprudence, which is clear that pre-emptive action is a broad concept and includes the possibility of prejudice to the reference or an impediment to justified action: *ICE* at [220]. The use of "might" in the definition implies a relatively low threshold of expectation because the CMA is at a stage of its investigation where it necessarily cannot be sure whether any action being taken or proposed to be taken by the merging parties will ultimately impede any action being taken by the CMA as a result of the Phase 2 reference: *Stericycle* at [129].

125. The Tribunal does not accept the Applicants' characterisation of the CMA's correspondence as evidence that the CMA misdirected itself. The context shows that the CMA was acting responsively to the letters from L&W and the assertions set out in them, in particular that there were no horizontal overlaps between the activities of Facebook and GIPHY. The CMA's 7 August 2020 letter makes clear that it has not reached that conclusion yet and, in any event, it will need to assess the vertical relationship between Facebook and GIPHY

when determining whether to grant the Carve-Out Requests. The CMA's correspondence explained that the connection between its assessment of any horizontal or vertical overlaps and the provisions of the IEO relates to the CMA's concern to preserve the competitive structure of the market.

126. As the statutory purpose of an IEO is precautionary, the CMA has a considerable margin of appreciation: *Stericycle* at [130]. Accordingly, in order to impose an IEO (or to maintain the imposition of an IEO), the CMA is not required to have formed a view that it is likely that prejudice to the Phase 2 reference (such as harm to the competitive structure of the market) will materialise or that there will in fact be an impediment to the CMA's remedial options. A risk or a possibility is enough.

127. The Tribunal considers that, although there is some dispute on the facts, there were at least some indicators of some risk or possibility of prejudice to the Phase 2 reference or impediment to the CMA's remedial options. The Applicants submitted that Oculus does not have an active relationship with GIPHY but, in the Tribunal's view, this is not conclusive to rule out the possibility of prejudice or impediment in circumstances where, as the Applicants described, there is a contractual possibility that might enable Oculus to use the API with GIPHY at some point. The Tribunal also notes that Facebook is said to own a sticker library, which could be an actual or potential rival to GIPHY. The Applicants did not dispute its ownership of a sticker library. It is also said that Facebook's Messenger and WhatsApp have an API with Tenor, which is a rival to GIPHY. The Applicants did not dispute this either. The Tribunal also notes that it is not disputed by the Applicants that there has been a termination of GIPHY's paid alignments and that, since the Transaction, Facebook has been funding GIPHY. The Tribunal does not take a view or make any findings whether Oculus' API with GIPHY, Facebook's sticker library, Facebook's Messenger and WhatsApp's API with Tenor and the termination of GIPHY's paid alignments will result in any prejudice to the reference or impede the CMA's remedial options. Nonetheless, these relationships, sticker library and financial dependency exist. The Tribunal is satisfied with the CMA's explanation and reasons why these features are causes

for concern and which it needs to investigate. Accordingly, there is a rational basis for the CMA's concerns and its cautious approach.

128. The Tribunal agrees with the CMA that it is not necessarily bound to accept assertions made by merging parties without further verification. There is an information asymmetry between the merging parties and the CMA and it is important that both sides share a common understanding of what derogations are requested and, where consent is given, what derogations are granted. For this to happen, it is clear that an undertaking seeking derogations to an IEO must engage with the CMA. It is not for an undertaking, which is seeking the CMA's consent to a derogation request, to say that the CMA should grant a derogation on the basis of its own assertions and assurances that there are no anti-competitive concerns. The CMA is under a duty to acquaint itself with the relevant information to enable it to assess whether there is a risk of pre-emptive action: *BAA* at [20(3)]. Accordingly, it is entitled when assessing derogation requests to investigate the matter by asking questions and, if considered necessary, to seek further information or documents that evidence the undertaking's assertions. Where the CMA has formed the view that it requires further information, it has a wide margin of appreciation to decide what information is needed: *BAA* at [20(3)]. Merging entities seeking derogations are expected to engage with the CMA when seeking them. The lack of real and constructive engagement in this case by Facebook is not a constructive approach. It appears to the Tribunal from the correspondence that the CMA was actively seeking further information from Facebook so that it could deal with the Carve-Out Requests properly. In cases where merging entities seek derogations from an IEO, there is invariably an element of give and take and, where appropriate, the working out of the precise terms of a derogation. This did not occur in this case.

129. At the hearing, Mr O'Donoghue and Ms Demetriou each took the Tribunal through the various paragraphs of the updated annotated version of the IEO which are the subject of the Carve-Out Requests. During that exercise, the Tribunal sought clarification on the implications of some of the proposed modifications under the Carve-Out Requests. For example:

(1) The Tribunal asked whether the modified paragraph 5(d) of the IEO applies in a situation where Facebook modifies or introduces new products, as opposed to GIPHY products, that access or supply GIFs.

(2) The Tribunal asked, in light of the proposed modification to paragraph 5(i) of the IEO which seeks to exclude the Facebook business entirely from the requirement not to make changes to key staff, whether the IEO would prevent pre-emptive action caused by changes to Facebook staff in an overseas location whose work had some connection to Facebook's activities in GIFs and stickers.

130. In respect of the first example raised by the Tribunal, Mr O'Donoghue replied that paragraph 5(d) would apply to modifications or new Facebook products in relation to the procurement or supply of GIFs and stickers, as opposed to the procurement or supply of social media services or communication services. In respect of the second example raised by the Tribunal, Mr O'Donoghue's response was that such staff changes would be a breach of paragraph 4 of the IEO if it gives rise to pre-emptive action.

131. The main thrust of the Applicants' arguments in respect of the Carve-Out Requests is that individual IEO provisions should not be read in isolation but read alongside and in combination with other provisions to assess whether, in respect of each of the Carve-Out Requests, granting them might give rise to a risk of pre-emptive action. In the Tribunal's view, it is not desirable or ideal to grant a derogation to an IEO provision on the basis that there is a broader provision within the IEO that catches all pre-emptive action. It is Mr Romney's evidence, which the Tribunal accepts, that the provisions in the CMA's template IEO were designed to specifically target those actions that may be taken by merging parties and which, in the CMA's substantial experience, are inherently most likely to give rise to concerns about pre-emptive action. The Tribunal is not persuaded, therefore, that in the circumstances of this case where the CMA has reasons for concern, it is an answer to those concerns to say that there are broader, fall back provisions within the IEO that can give it comfort against the risk of pre-emptive action. Furthermore, it is important that merging parties, the CMA and, in the case where one has been appointed, the MT, know with

clarity what the parameters are in respect of actions that are prohibited, required or allowed under the IEO (and any derogations) and that each side knows what to expect from the other. It is not sufficient that Facebook understands what it means and the implications of its Carve-Out Requests if the CMA and the MT do not. There are practical implications of Facebook's approach in the context of the current position with the IEO. In particular, Facebook's compliance statements in effect exclude the matters which are the subject of the Carve-Out Requests, so that Facebook is excluding large areas of its business without the CMA knowing what they are and what Facebook is doing in those areas which might fall within the IEO.

132. In the Tribunal's view, the questions and concerns raised by Ms Demetriou on behalf of the CMA when she went through the updated annotated version of the IEO are legitimate and reasonable questions of a responsible competition authority. It may well be that, with the provision of the further information requested by the CMA, the CMA's questions and concerns can be dealt with or taken into account in formulating appropriate derogations to the IEO.

133. Accordingly, for the reasons set out in this judgment, the Tribunal finds that the CMA's decision that it would not determine the Carve-Out Requests without further information was rational and the Applicants' Ground 1 fails.

(b) Ground 2: the CMA's refusal to grant the Carve-Out Requests is disproportionate

(i) The Applicants' submissions

134. The Applicants submitted that paragraph 1.8 of the Interim Measures Guidance and A1P1 is engaged such that the CMA must comply with the principle of proportionality when imposing IEOs and considering whether to grant the Carve-Out Requests.

135. The Applicants contended that, even if the provisions of the IEO which are the subject of the Carve-Out Requests did bear some rational connection to the statutory purpose of preventing pre-emptive action, the CMA's refusal to grant

the Carve-Out Requests is disproportionate, bearing in mind the existence of alternative means of preventing pre-emptive action – namely, the other provisions of the IEO which would be retained and which apply to the Facebook business, as well as ongoing supervision by both the MT and HSM. In his reply submissions, Mr O'Donoghue rejected the CMA's contention that the CMA's anterior decision to request information is subject only to a high rationality review.

136. The Applicants submitted that, without the derogations included in the Carve-Out Requests, the IEO provisions are disproportionate because they apply globally to the 50,000 plus Facebook employees and 250 subsidiaries, most of which have no connection with the UK. This is an enormous and unjustified constraint on the Facebook business and the extraordinary breadth of the provisions of the IEO is enormously burdensome. The Applicants referred the Tribunal to the two witness statements of Ms Del Rosario, which describe variously the large number of staff she considered were caught by the broad definition of "*key staff*" in the IEO, the range of functions performed by employees on a global basis that cannot be easily delineated, the number of Facebook's patent assets, customer and supplier contract relationships, and the challenges and restrictions that paragraphs 5(i) and 5(k) of the IEO place on the ordinary course of a global business the size and scale of Facebook's. In light of the number of weeks that, according to Ms Del Rosario, the CMA previously took to consider matters relating to the first and third derogation requests, it is commercially unrealistic to have to seek individual derogations from the CMA, for example, for every change in management, product or service or for an asset disposal.

137. The Applicants contended that the CMA's refusal to grant the Carve-Out Requests in order to preserve the unprecedented remedial option of requiring divestiture of Facebook's assets alongside the GIPHY business is disproportionate, since divesting the GIPHY business in full would restore the status quo *ante*. They argued that it is incumbent upon the CMA to explain why this extraordinary remedy is a realistic possibility or is something which can be fairly taken into account at this stage. Furthermore, if, as part of a future remedy, the CMA thinks it might exceptionally need to order divestiture of

some of Facebook's assets, the proportionate step is to impose an unwinding order to restore any assets that have migrated from GIPHY to Facebook, not to freeze the entire Facebook business globally.

138. In his reply submissions, Mr O'Donoghue also argued that the IEO has to be seen in its context. It restricts Facebook's global business, which includes over 50,000 employees, more than 250 subsidiaries and over $70 billion in global turnover in order to preserve the CMA's options in relation to a GIPHY business which has just over 100 employees, involves a single legal entity and a *de minimis* turnover.

139. The Applicants submitted that the information sought by the CMA was disproportionate because the CMA fell back essentially on a blanket request for a host of information derived from paragraph 3.44 of the Interim Measures Guidance and applied it in an unthinking way. Mr O'Donoghue argued that, by reference to paragraph 3.47 of the Interim Measures Guidance, paragraph 3.44 is concerned with integration. However, the Carve-Out Requests do not seek to integrate Facebook with GIPHY, which are currently being run as two separate businesses.

140. Mr O'Donoghue further submitted that, if the CMA was genuinely concerned about the pre-IEO integration between Facebook and GIPHY, paragraph 3.21 of the Interim Measures Guidance provides that the CMA may impose interim unwinding orders if it judges it necessary to preserve the CMA's ability to pursue its investigation or to implement an effective remedy. Notably, the CMA has not seen fit to do so in this case and the Applicants suggested that is because the CMA does not consider that there is any ongoing risk to its remedial options arising between now and the date of any remedy direction.

(ii) The CMA's submissions

141. The CMA accepted that it has to act proportionately but drew a distinction between a prior question and an ultimate decision. Ms Demetriou submitted that an ultimate decision, such as the CC's decision about divestment in *BAA*, is in principle subject to a proportionality review, as is a decision by the CMA

to impose an IEO or a decision refusing an IEO derogation. However, as regards the prior question where the CMA requests information in order to determine an ultimate decision, that prior question is subject to a rationality review. Accordingly, the key question in this case is whether the CMA acted rationally in seeking further information necessary to enable it to understand the scope of the Carve-Out Requests in practice and to make a proper risk assessment. In these circumstances, the standard of review is one of rationality, in accordance with *BAA*. As the expert regulator, the CMA has a wide margin of discretion in determining what information it needs in order to exercise its statutory powers. The CMA submitted that it did not act irrationally.

142. The CMA also submitted that if the Tribunal were not persuaded and thought this were a proportionality issue, in the circumstances of this case, it is plain that the CMA has acted proportionately in seeking the further information. Further, even if one applies a proportionality standard as to what material the CMA needs in order to make the assessment of risk, the CMA must have a wide margin of discretion.

143. The CMA contended that if one were applying the proportionality test, the only additional factor to consider is the burden on Facebook. However, the information set out in Ms Del Rosario's two witness statements about the burden on Facebook was never put to the CMA and has only been given in the course of this litigation. Moreover, it is a burden of Facebook's own making because the CMA had not closed its mind to the Carve-Out Requests. The fact that a derogation of some form has not been granted is because Facebook took the stance, as a matter of principle, not to provide the CMA with the information it sought.

144. The CMA reiterated that it has a wide range of remedial options available to it and it does not want to preclude any at this early stage of the investigation. For the reasons already explained in relation to Ground 1, the divestment of GIPHY may not remedy harm caused to competition in the market and it is not the only possible remedy since, if necessary, the CMA can order divestiture of parts of Facebook's assets, services or business.

145. The CMA told the Tribunal that, despite making its Carve-Out Requests on the premise that there are very few, if any, horizontal overlaps between the activities of Facebook and GIPHY, to date, Facebook has not provided the CMA with any of the further information contemplated by paragraph 3.44 of the Interim Measures Guidance. The Applicants relied on the second witness statement of Ms Del Rosario to describe how difficult it would be for Facebook to provide all of the information required by the Interim Measures Guidance. However, this is not a case in which Facebook provided some of the information then said the CMA should have enough and it is disproportionate to provide more.

146. The CMA also rejected the Applicants' contention that paragraph 3.44 of the Interim Measures Guidance relates to a situation where, pending the CMA's investigation, an acquirer wishes to integrate part of the target's business with its own. Ms Demetriou argued that paragraph 3.46 of the Interim Measures Guidance makes it clear that paragraph 3.44 is not only limited to horizontal issues but also vertical issues.

147. The CMA submitted that s.72(3B) EA02 gives it the power, not a duty, to make an unwinding order to reverse pre-emptive action taken. The CMA is entitled to take the view that it is sufficient to prevent more integration taking place and one cannot read into the fact that the CMA has not made an unwinding order in this case that the CMA does not consider there to be any pre-emptive action so far.

(iii) The Tribunal's analysis

148. As set out at [119]-[120] of this judgment, the reviewable decision in this case is the CMA's decision that it would not determine the Carve-Out Requests without the further information requested or at least sufficient further information, and the relevant principles to be applied are those set out in *BAA*. Accordingly, where an applicant for a review under s.120 EA02 contends that the CMA acted disproportionately, the standard of review is essentially equivalent to that given by the ordinary domestic standard of rationality, which is flexible and can be adjusted to take into account proportionality: *BAA* at [20(5)]-[20(7)].

149. The Tribunal held in relation to Ground 1 that the CMA acted rationally in deciding that it would not determine the Carve-Out Requests without further information. As part of the Tribunal's analysis, it noted at [128] of this judgment that, when the CMA acquaints itself with the relevant information to enable it to assess whether there is a risk of pre-emptive action, it has a wide margin of appreciation to decide what information is needed.

150. The Applicants' contention that the IEO imposes a disproportionate burden because, owing to the international nature, size and scale of the Facebook business it is commercially impracticable to comply with the IEO provisions, is not directed towards the reasonableness of the CMA's request for further information, but instead to the breadth of the template IEO and its continued imposition. The latter is a matter for the CMA to assess under the Carve-Out Requests when it has the relevant information to enable it to carry out its assessment.

151. The Tribunal makes similar observations regarding the Applicants' contention that the IEO is disproportionate to preserve the divestiture of GIPHY as a remedial option, which the Tribunal notes is, in any event, premised on a narrow view regarding the limits of the CMA's remedial options. Again, this contention is directed towards the continued imposition of the IEO provisions, which are the subject of the Carve-Out Requests, and not to the CMA's decision that it would not determine the Carve-Out Requests without further information.

152. The Tribunal is not persuaded by the Applicants' attempt to distance themselves from the scope of paragraph 3.44 of the Interim Measures Guidance by reading across into paragraph 3.44 the reference in paragraph 3.47 to integration in order to argue that paragraph 3.44 applies to situations where merging parties wish to integrate during the course of the CMA's investigation, whereas Facebook and GIPHY are not seeking to integrate further pending the CMA's investigation.

153. Paragraph 3.44 of the Interim Measures Guidance sets out the types of information and range of evidence, which the CMA requires, to assess derogation requests in situations where one merging party's business is not engaged in activities related to the other merging party's business. The CMA

submitted, based on the assertions made by L&W when making the Carve-Out Requests, that it was common ground that Facebook was seeking a complex derogation to which paragraph 3.44 of the Interim Measures Guidance applies. However, in his reply submissions, Mr O'Donoghue told the Tribunal that it is not common ground that Facebook is seeking a complex derogation.

154. Irrespective of whether the Carve-Out Requests are a complex derogation or not, the Tribunal emphasises that the CMA has a wide margin of appreciation to decide what information is needed: *BAA* at [20(3)]. Unless the information requested by the CMA is so manifestly without reasonable foundation, it is not for this Tribunal to second guess what information is sufficient for the CMA to assess and determine the Carve-Out Requests. In the Tribunal's view, the type of information, which the CMA set out in the Schedule of Outstanding Information, appears rational.

155. Accordingly, the CMA's request for information in order to determine the Carve-Out Requests was not disproportionate and its decision not to determine them without further information was not irrational. For the reasons set out in this judgment, the Applicants' Ground 2 fails.

156. In rejecting Grounds 1 and 2, the Tribunal notes that this Application raises important issues of policy for the effective functioning of merger control in the UK. The corollary of the voluntary nature of the regime is that the CMA is given wide powers to suspend the integration of merging companies and it is for merging parties to satisfy the CMA that the relaxation of any interim measures imposed by the CMA is justified. It is therefore incumbent upon merging parties to co-operate with the CMA, particularly when making derogation requests. As set out at paragraph 3.2 of the Interim Measures Guidance, merging parties should engage with the CMA and derogation requests need to be fully specified, reasoned and supported by relevant evidence.

157. The Tribunal notes with disappointment the lack of engagement between the CMA and Facebook in respect of the Carve-Out Requests to the IEO. The

Tribunal had hoped that, by directing at the CMC that the parties liaise to compile the Schedule of Outstanding Information, the parties would engage.

158. At [119] of this judgment, the Tribunal made it clear that it did not express any view as to whether Facebook's chosen course of action is in breach of the IEO. However, the Tribunal noted that Facebook's decision effectively to proceed on the basis of it having already been granted the Carve-Out Requests, which have not been granted, is unsatisfactory. It did so by way of the letters sent by its solicitors to accompany each compliance statement, setting out a number of significant qualifications with respect to Facebook's compliance with the IEO. Paragraph 3.7 of the Interim Measures Guidance is clear: it is of the utmost importance that interim measures are scrupulously complied with when the CMA is considering a derogation request and merging parties should not themselves form judgements or reach decisions that are properly for the CMA.

159. It is most unsatisfactory in this case that Facebook has not sought to engage with the CMA and has not provided the CMA with information to ensure that its Carve-Out Requests are resolved so that it can submit unqualified compliance statements. Even if Facebook was in fact unable to provide all the information sought by the CMA, it should have made efforts to comply with the information requests so far as it was possible. It is also undesirable that Facebook has chosen to take what might be regarded as a high risk strategy not to comply with outstanding IEO requirements and not to inform the CMA of the actions it is taking or the changes it is making to its business that might fall within the scope of the IEO.

160. The List of Subsidiaries is the type of information that should have been provided to the CMA as part of the Carve-Out Requests. The CMA is now in possession of the List of Subsidiaries and it informed the Tribunal by letter on 29 October 2020 that it will consider this new information in line with its statutory powers to impose interim measures. It is not for the Tribunal to assess or suggest whether this information is sufficient.

161. In the light of the submissions and evidence filed in these proceedings, Facebook would appear to have good grounds for submitting that the IEO is

unnecessarily wide and burdensome. This is a position which the CMA might ultimately find to be correct once the information it has requested has been provided and analysed. That said, the approach Facebook followed has not enabled the CMA to decide what derogations sought by the Carve-Out Requests are appropriate. Whilst the Tribunal has determined that the approach of Facebook was not the correct one in the circumstances, the Tribunal appreciates the practical difficulties that Facebook encountered in needing to file its initial compliance statement before the issue of its Carve-Out Requests could be resolved.

(c) Ground 3: the CMA's decision infringes the requirement of legal certainty

(i) The Applicants' submissions

162. The Applicants submitted that the IEO did not meet the test of legal certainty and is impossible to comply with. Parliament cannot have intended, when passing s.72 EA02, to have authorised the CMA to impose measures that are impossible to comply with. However, certain parts of the IEO are not well drafted. In particular, terms in the IEO such as "*key staff*", "*reasonable steps to encourage*", and "*ordinary course of business*" are vague and not clearly defined. At the hearing, Mr O'Donoghue disputed the CMA's suggestion that the Applicants seemed largely to have resiled from Ground 3 in their skeleton argument. Mr O'Donoghue clarified that the Applicants were not asking the Tribunal to declare that the IEO is invalid for uncertainty but that it is in light of the size, global nature and scale of the Facebook business, that particular terms in the IEO are impossibly vague and that places Facebook in an invidious position when it comes to the question of compliance.

(ii) The CMA's submissions

163. The CMA submitted that the Applicants' Ground 3 goes nowhere. Either the IEO is sufficiently clear to be in accordance with the law or it is not. That is a binary question, and the CMA disagrees that there is any material lack of clarity in the IEO. Terms such as "*key staff*" and "*ordinary course of business*" are defined in the IEO and can be read alongside the Interim Measures Guidance.

To the extent that further guidance is needed, the Tribunal's case law and the CMA's decisional practice considered the meaning and application of "*ordinary course of business*": see *Electro Rent* and, for example, the CMA's penalty notice decision in Case ME/6762/18 (Completed acquisition by Nicholls' (Fuel Oils) Limited of the oil distribution business of DCC Energy Limited in Northern Ireland). Moreover, a party who is concerned about any uncertainty in respect of "*ordinary course of business*" or "*key staff*" can seek the CMA's views on the interpretation of the IEO. The Applicants' central complaint against these terms appear to be about the purported impact of their proportionality rather than their meaning. The concept of "reasonableness" is well trodden in numerous areas of law, including, for example, contract law, restraint of trade and employment law. Ms Demetriou also pointed out at the hearing that a complaint that the IEO is not very well drafted is not a ground for judicial review.

164. The CMA argued that even if particular terms of the IEO were difficult to apply to the complexity of Facebook's business, that is not a legal certainty issue as the provisions themselves are sufficiently clear. What is needed is information about Facebook's business so that the IEO provisions can be modified in a way that makes them easier to apply.

(iii) The Tribunal's analysis

165. The Tribunal notes that the IEO itself contains definitions, which are fairly clear, and the IEO uses well-recognised terms which are capable of understanding and on which the Applicants can take advice from their experienced legal advisers. It is a document that is clear in itself. It is appreciated that, as with any definitions incorporating terms such as "*reasonable steps*" or "*ordinary course of business*", there may be some uncertainty when looking at the margins. Where the Applicants consider that the application of the IEO to the nature, size and scale of the Facebook business renders some uncertainty as to the precise scope of the boundaries to the restrictions in the IEO, it is open to them to seek clarification from the CMA. The Tribunal also agrees with the CMA's argument that the Applicants' contention that the IEO is not well drafted is not in itself a ground for judicial review. The Tribunal finds no ground for criticism

of the CMA's drafting, which largely follows the template familiar to those dealing with IEOs.

166. Accordingly, for the reasons set out in this judgment, the Applicants' Ground 3 fails.

H. CONCLUSION

167. For the reasons set out in this judgment, the Tribunal unanimously decides that Grounds 1, 2 and 3 of the NoA are dismissed.

Hodge Malek QC
Chairman

Tim Frazer

Timothy Sawyer CBE

Charles Dhanowa O.B.E., Q.C. (*Hon*)
Registrar

Date: 13 November 2020

ACQUISITION BY FACEBOOK, INC, THROUGH ITS SUBSIDIARY TABBY ACQUISITION SUB, INC., OF GIPHY, INC

Initial Enforcement Order made by the Competition and Markets Authority pursuant to section 72(2) of the Enterprise Act 2002 (the Act)

Whereas:

(a) the Competition and Markets Authority (**CMA**) has reasonable grounds for suspecting that it is or may be the case that Facebook, Inc (**Facebook**) and Giphy, Inc (**Giphy**) have ceased to be distinct;

(b) the CMA is considering, pursuant to section 22 of the Act, whether it is or may be the case that a relevant merger situation has been created and whether the creation of that situation has resulted or may be expected to result in a substantial lessening of competition in any market or markets in the United Kingdom (UK);

(c) the CMA wishes to ensure that no action is taken pending final determination of any reference under section 22 of the Act which might prejudice that reference or impede the taking of any action by the CMA under Part 3 of the Act which might be justified by the CMA's decisions on the reference; and

(d) the circumstances set out in section 72(6) of the Act do not apply and the reference has not been finally determined in accordance with section 79(1) of the Act.

Now for the purposes of preventing pre-emptive action in accordance with section 72(2) of the Act the CMA makes the following order addressed to Facebook, Tabby Acquisition Sub, Inc. (**Tabby Acquisition**), Facebook UK Limited (**Facebook UK**) and Giphy (**Order**).

Commencement, application and scope

1. This Order commences on the commencement date: 9 June 2020.

2. Save as expressly set out below, t~~T~~his Order applies to Facebook, Tabby

Acquisition, Facebook UK and Giphy.

3. Notwithstanding any other provision of this Order, no act or omission shall constitute a breach of this Order, and nothing in this Order shall oblige Facebook, Tabby Acquisition, Facebook UK or Giphy to reverse any act or omission, in each case to the extent that it occurred or was completed prior to the commencement date.

Management of the Facebook and Giphy businesses until determination of proceedings

4. Except with the prior written consent of the CMA, Facebook, Tabby Acquisition, Facebook UK and Giphy shall not, during the specified period, take any action which might prejudice a reference of the transaction under section 22 of the Act or impede the taking of any action under the Act by the CMA which may be justified by the CMA's decisions on such a reference, including any action which might:

   (a) lead to the integration of the Giphy business with the Facebook business;

   (b) transfer the ownership or control of ~~the Facebook business or~~ the Giphy business or any of ~~their~~ its subsidiaries; or

   (c) otherwise impair the ability of the Giphy business or the Facebook business to compete independently in any of the markets affected by the transaction.

5. Further and without prejudice to the generality of paragraph 4 and subject to paragraph 3, Facebook, Tabby Acquisition, Facebook UK and Giphy shall at all times during the specified period procure that, except with the prior written consent of the CMA:

   (a) the Giphy business is carried on separately from the Facebook business and the Giphy business's separate sales or brand identity is maintained;

   (b) the Giphy business and the Facebook business are maintained as a going concern and sufficient resources are made available for the development of the Giphy business and the Facebook business, on the basis of their respective pre-merger business plans;

   (c) except in the ordinary course of business, no substantive changes are made to the organisational structure of, or the management responsibilities within, the Giphy business ~~or the Facebook business~~;

(d) the nature, description, range and quality of goods and/or services supplied in the UK by ~~each of the two businesses~~the Giphy business ~~are~~ is maintained and preserved, and the nature, description, range and quality of goods and/or services supplied in the UK by those parts of the Facebook business relating to the procurement or supply of GIFs and stickers is maintained;

(e) except in the ordinary course of business for the separate operation of the two businesses:

(i) all of the assets of the Giphy business ~~and the Facebook business~~ are maintained and preserved, including facilities and goodwill;

(ii) none of the assets of the Giphy business ~~or the Facebook business~~ are disposed of; and

(iii) no interest in the assets of the Giphy business ~~or the Facebook business~~ is created or disposed of;

(f) there is no integration of the information technology of the Giphy or Facebook businesses, and the software and hardware platforms of the Giphy business shall remain essentially unchanged, except for routine changes and maintenance;

(g) the customer and supplier lists of the two businesses shall be operated and updated separately and any negotiations with any existing or potential customers and suppliers in relation to the Giphy business will be carried out by the Giphy business alone and for the avoidance of doubt the Facebook business will not negotiate on behalf of the Giphy business (and vice versa) or enter into any joint agreements with the Giphy business (and vice versa);

(h) all existing contracts of the Giphy business and the Facebook business continue to be serviced by the business to which they were awarded;

(i) no changes are made to key staff of the Giphy business ~~or Facebook business~~;

(j) no key staff are transferred between the Giphy business and the Facebook business;

(k) all reasonable steps are taken to encourage all key staff to remain with the Giphy business ~~and the Facebook business~~; and

(l) no business secrets, know-how, commercially-sensitive information,

intellectual property or any other information of a confidential or proprietary nature relating to either of the two businesses shall pass, directly or indirectly, from the Giphy business (or any of its employees, directors, agents or affiliates) to the Facebook business (or any of its employees, directors, agents or affiliates), or vice versa, except where strictly necessary in the ordinary course of business (including, for example, where required for compliance with external regulatory and/or counting obligations or for due diligence, integration planning or the completion of any merger control proceedings relating to the transaction) and on the basis that, should the transaction be prohibited, any records or copies (electronic or otherwise) of such information that have passed, wherever they may be held, will be returned to the business to which they relate and any copies destroyed.

Compliance

6. Facebook, Tabby Acquisition, Facebook UK and Giphy shall procure that each of their subsidiaries complies with this Order as if the Order had been issued to each of them.

7. Facebook, Tabby Acquisition, Facebook UK and Giphy shall provide to the CMA such information or statement of compliance as it may from time to time require for the purposes of monitoring compliance by Facebook, Tabby Acquisition, Facebook UK and Giphy and their subsidiaries with this Order. In particular, on 23 June 2020 and subsequently every two weeks (or, where this does not fall on a working day, the first working day thereafter) the Chief Executive Officer or other persons as agreed with the CMA of each of Facebook, Tabby Acquisition, Facebook UK and Giphy shall, on behalf Facebook / Tabby Acquisition / Facebook UK / Giphy provide a statement to the CMA in the form set out in the Annex to this Order confirming compliance with this Order.

8. At all times, Facebook, Tabby Acquisition, Facebook UK and Giphy shall, or shall procure that Giphy shall, actively keep the CMA informed of any material developments relating to the Giphy business or the Facebook business, which includes but is not limited to:

   (a) details of key staff who leave or join the Giphy business or the Facebook business;

   (b) any interruption of the Giphy or Facebook business (including without limitation its procurement, production, logistics, sales and employee relations arrangements) that has prevented it from operating in the ordinary course of business for more than 24 hours;

(c) all substantial customer volumes won or lost or substantial changes to the customer contracts for the Giphy or Facebook business including any substantial changes in customers' demand; and

(d) substantial changes in the Giphy or Facebook business's contractual arrangements or relationships with key suppliers.

Save that, in the case of the Facebook business, "material developments" shall exclude any developments which arise in the ordinary course of business and which do not relate to the procurement or supply of GIFs or stickers.

9. If Facebook, Tabby Acquisition, Facebook UK or Giphy has any reason to suspect that this Order might have been breached it shall immediately notify the CMA and any monitoring trustee that Facebook, Tabby Acquisition, Facebook UK and/or Giphy may be directed to appoint under paragraph 10.

10. The CMA may give directions to a specified person or to a holder of a specified office in any body of persons (corporate or unincorporated) to take specified steps for the purpose of carrying out, or ensuring compliance with, this Order, or do or refrain from doing any specified action in order to ensure compliance with the Order. The CMA may vary or revoke any directions so given.

11. Facebook, Tabby Acquisition, Facebook UK and Giphy shall comply in so far as they are able with such directions as the CMA may from time to time give to take such steps as may be specified or described in the directions for the purpose of carrying out or securing compliance with this Order.

Interpretation

12. The Interpretation Act 1978 shall apply to this Order as it does to Acts of Parliament.

13. For the purposes of this Order:

'the Act' means the Enterprise Act 2002;

'an affiliate' of a person is another person who satisfies the following condition, namely that any enterprise (which, in this context, has the meaning given in section 129(1) of the Act) that the first person carries on from time to time and any enterprise that the second person carries on from time to time would be regarded as being under common control for the purposes of section 26 of the Act;

‘**business**’ has the meaning given by section 129(1) and (3) of the Act;

‘**commencement date**’ means 9 June 2020;

‘**control**’ includes the ability directly or indirectly to control or materially to influence the policy of a body corporate or the policy of any person in carrying on an enterprise;

‘**the decisions**’ means the decisions of the CMA on the questions which it is required to answer by virtue of section 35 of the Act;

‘**Facebook**’ means Facebook, Inc a company incorporated in the state of Delaware, United States with principal executive offices at 1601 Willow Road Menlo Park CA 94025 United States

‘**the Facebook business**’ means the business of Facebook and its subsidiaries carried on as at the commencement date;

‘**Facebook UK**’ means Facebook UK Limited (Company number 06331310);

‘**Giphy**’ means Giphy, Inc, a company incorporated in the state of Delaware, United States;

‘**the Giphy business**’ means the business of Giphy and its subsidiaries carried on as at the commencement date;

‘**key staff**’ means staff in positions of executive or managerial responsibility and/or whose performance affects the viability of the business;

‘**the ordinary course of business**’ means matters connected to the day-to-day supply of goods and/or services by Giphy or Facebook and does not include matters involving significant changes to the organisational structure or related to the post-merger integration of Giphy and Facebook;

‘**specified period**’ means the period beginning on the commencement date and terminating in accordance with section 72(6) of the Act;

‘**subsidiary**’, unless otherwise stated, has the meaning given by section 1159 of the Companies Act 2006;

‘**the transaction**’ means the transaction by which Facebook and Giphy have ceased to be distinct within the meaning of section 23 of the Act;

‘**the two businesses**’ means the Facebook business and the Giphy business;

‘**Tabby Acquisition**’ means Tabby Acquisition Sub, Inc., a company incorporated in the state of Delaware, United States;

unless the context requires otherwise, the singular shall include the plural and vice versa.

Anna Caro Assistant Director, Mergers