Neutral citation [2022] CAT 17

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1429/4/12/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

19 April 2022

Before:

SIR MARCUS SMITH
(President)

Sitting as a Tribunal in England and Wales

BETWEEN:

META PLATFORMS, INC.

Applicant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

- and -

(1) APPLICATION DEVELOPERS ALLIANCE
(2) THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION
(3) PRIVACY INTERNATIONAL

Interveners

Heard in private at Salisbury Square House on 19 April 2022

RULING (CONFIDENTIALITY)

APPEARANCES

Daniel Jowell QC, Gerard Rothschild and Richard Howell (instructed by Latham & Watkins (London) LLP) appeared on behalf of the Applicant.

Tristan Jones and Emma Mockford (instructed by the Competition and Markets Authority) appeared on behalf of the Respondent.

Alison Berridge (instructed by Clifford Chance LLP) appeared on behalf of Snap, Inc.

1. This is a public ruling made after a hearing which took place before me in private on 19 April 2022. The hearing took place in private because it necessarily involved reference to certain highly confidential and sensitive material. This ruling, however, has been written so as to avoid trespassing into this material, and can, therefore, appropriately be made public.

2. The purpose of the hearing was to ensure that the entirely legitimate interests in certain highly confidential information will be properly managed at the forthcoming hearing where the Applicant ("Meta") seeks to challenge the merger decision of the Respondent (the "CMA"). It is unnecessary to articulate the details of this challenge in this ruling, and I do not do so.

3. The position is that, of the various grounds of review articulated by Meta in its Re-Amended Notice of Application, Grounds 1, 2, 5 and 6 can (on the whole – counsel entirely properly could not be absolutely definitive) be conducted in public. Grounds 3, 4 and 4A, according to Meta, ought to be conducted at least in part in private, so as to enable appropriate reference to the confidential material that I have described.

4. The CMA has a position that is broadly similar to that of Meta. The CMA agrees, in relation to Ground 4, that that ground should not quite entirely but substantially be heard in private. On the other hand, in relation to Grounds 3 and 4A the CMA's position is that these matters can be heard in public with elliptical references to confidential material and without the need to go into private session as regards those two grounds.

5. As the CMA rightly points out, the starting point for consideration of such matters is Schedule 4, paragraph 1, of the Enterprise Act 2002. Broadly speaking, the Tribunal's substantive decision at the conclusion of the substantive hearing (the "final judgment") <u>must</u> set out the reasons for the conclusion that the Tribunal reaches in respect of all grounds of challenge. Subject to that, the Enterprise Act 2002 enables the Tribunal to take steps to protect confidential information, including commercially sensitive information. It is possible to do so using redactions, although, for my part, I would be very keen to avoid this in any judgment and instead have carefully-crafted elliptical

references and generalisations in the final judgment to material that is sensitive. (I leave out of account questions of "closed material" procedure and "closed" judgments: no-one before me contended that this was a case where such questions needed to be canvassed.)

6. It seems to me that the paramount objective is to produce a final judgment that is comprehensible to a reasonably interested person, an outsider to the litigation, who wishes to understand precisely why the Tribunal has reached the conclusion that it did. That, I think, is what open justice means in relation to a judgment determining a matter before the Tribunal. If any part of the final judgment has to say, "You can only understand our reasoning on this point if you read (which by definition you cannot) confidential Annex X", then that is, to my mind, unacceptable.

7. The final judgment of the Tribunal, of course, is the end point of the process of dispute resolution before the Tribunal. But it is also a good starting point for the analysis of the anterior points of procedure and confidentiality that are before me today.

8. If I can begin with the very start: the investigation or inquiry conducted by the CMA. The CMA rightly applies its own process of confidentiality in the course of investigating and making the decisions that it does, which is <u>broader</u> in terms of the confidentiality protection conferred than the protection that the Tribunal can itself properly confer.

9. This involves, therefore, a mismatch in approach in terms of protection of confidential information between that which is properly to be protected in the processes before the CMA and that which is properly to be protected in the processes before the Tribunal, the former regime being wider than the latter. This, in terms of the work that it involves for the CMA, is certainly inconvenient and difficult for the CMA, but it is absolutely justified and necessary. The CMA is investigating and deciding at the administrative level and the Tribunal is the appellate or judicial review (as the case may be) policeman. The CMA has the latitude that it has in terms of protecting confidential information in the processes before it precisely because of the Tribunal's supervisory jurisdiction

over it. That means that, as the process goes on, and as one moves from decision of the CMA to the review of the CMA's decision by the Tribunal, the narrower the proper scope of confidentiality protection becomes. In short, what may, entirely properly, be protected before the CMA (and I say nothing about what can and what cannot appropriately be protected – that is not before me as an issue today) can be far broader than what can appropriately be protected on review or appeal of the CMA's decision, where the question of open justice applies with full force. That, as I say, entails additional work on the part of the CMA in adjusting from the administrative confidentiality regime to the judicial. For my part, I am extraordinarily grateful, as I am sure we all are, for the very considerable efforts that the CMA have undertaken in this regard in this case. It is quite obvious that those efforts have been considerable and carefully directed.

10. One way of squaring the circle of process before the Tribunal and protecting legitimate confidential information whilst enabling open justice is the use of confidentiality rings. Such a ring is fully deployed here. One enquiry that I raised in the course of this hearing was the extent to which Meta itself – as opposed to its external advisers – was within this confidentiality ring. The answer is that Meta is not, as opposed to external advisers, within the confidentiality ring at all. That is a point on which Mr Jowell QC – substantially on my invitation – has addressed me this morning.

11. It seems to me that it would be a mistake on my part to encourage any late application by Meta to vary the confidentiality ring at this stage. The substantive proceedings are imminent. I say nothing about what my reaction might have been at the outset. It is trite that one should only exclude the lay client itself, as I will refer to Meta here, from a confidentiality ring where very good reason exists. One can do so, but one must, as a Tribunal, exercise extreme caution in doing so. Of course, every case needs to be considered on its own facts, and – particularly in a case like the present – the notion that employees of Meta would be entitled to participate in the confidentiality ring more or less as of right only needs to be stated to be rejected. Nevertheless, it is relatively rare for the lay client to be excluded altogether, including participation by way of in-house counsel.

12. The reason, of course, is clear. The professional advisers engaged by a lay client can only advise. They must take their instructions from somewhere, and it is for that reason that usually some form of lay client presence is required even within the innermost reaches of confidentiality rings, so that a proper set of instructions can be given to the external advisers who are properly within the ring and conducting the affairs of the lay client.

13. However, we are at this stage in the eleventh hour of matters. It seems to me that it would be a mistake to change horses in midstream, without there being a <u>specific</u> good reason for doing so now. It seems to me that we should retain the presently constituted confidentiality ring. However, I make clear: the fact that Mr Jowell QC will not be able to address me on certain reactions his client might have had, had Meta been within the ring, will be due to the fact that there is an inability to take instructions rather than anything else. That is something which the Tribunal will bear in mind during the course of the substantive hearing.

14. If there should come a point where Mr Jowell QC's team are professionally embarrassed in the sense that they absolutely need to take instructions from Meta, without which they cannot pursue a point, then, of course, I will hear that, but I hope that that will not be necessary.

15. So much for the confidentiality ring in the present case. Given the existence of the ring, the question is the extent to which its existence enables the substantive hearing to be conducted in public. Elliptical reference to confidential material in open court is, of course, one way of dealing with the matter in public. But this is in and of itself a breach (albeit a justified one) of the open justice principle and it may unduly inhibit counsel in making submissions with proper force. So there is to my mind a fair process question, and I, for my part, place a great deal of weight on what Meta have said: specifically, Mr Jowell QC has urged the Tribunal to sit in part in private precisely so as to enable his team to put forward the points they want to make on Meta's behalf with appropriate force.

16. I consider that the Tribunal ought to facilitate this, in the interests of allowing full and free argument. If the parties would be aided by going into private session at any point then I will permit this. It seems to me that I should, in this

instance, be guided by the good sense of the legal teams on both sides, but principally by Meta. If and when Mr Jowell QC, and in response the CMA, indicate that they need to go into private session to make the points that they need to make, then I will accede to that application and we will go into private session. Obviously, the Tribunal reserves the right to police this, but I have every expectation that the request to move into private session will be appropriately made in this case. So in terms of all sensitive matters in relation to all grounds of review, when counsel indicate that they want to move into private session, that is what we will do. I hope it can be kept to the minimum.

17. As the CMA rightly says, the confidentiality regime that informs the conduct of the hearing may not necessarily inform the content of the Tribunal's final judgment when it is ultimately handed down. The final judgment will obviously be reserved in this case, given the complexities that Meta's application gives rise to, and so there will be a scope for careful crafting of the final judgment so as to circumnavigate the areas of sensitivity that exist in this case.

18. It may be that after careful consideration certain confidential material must unavoidably be mentioned. If that is the case, then it will be mentioned, but I want to be clear that the Tribunal will take every effort consistent with open justice to ensure that legitimate commercial interests are protected.

19. In this regard I am very grateful to Snap, Inc. ("Snap") for its helpful submissions on the question of confidentiality. I am not in large part going to look behind the submissions that Snap made in its written submissions regarding confidentiality. I say that because those submissions are in the first place intrinsically plausible. In the second place, they are in essence endorsed by the CMA, who has acted as the "policeman" in this regard. Thirdly, they are properly and responsibly advanced by Snap. It seems to me that for those three reasons, the points made by Snap in support of commercial confidentiality are right and need to be respected. I should say that Meta itself entirely accepts that there is a legitimate interest in Snap to have its position protected, and that too is something that I take into account.

20. It seems to me that for the most part, therefore, and subject to three points that I am going to come to, Snap's interests need to be protected, and Mr Jowell QC and the CMA will need to ensure that we go into private session when those sensitive areas are liable to be traversed in submission or argument in the course of the hearing process.

21. I said that there are three points that I need to consider in relation to that. Those three points are, first of all, the ownership by Snap of Gfycat, Inc. ("Gfycat"), which at present I am prepared to assume is in the confidential domain. It seems to me that it is going to be next to impossible to keep the fact of the acquisition out of the final judgment, and if that is the case, then it seems to me right that we should grasp that nettle now, because it will enable a degree of further latitude in the open submissions that both Meta and the CMA can make at the substantive hearing. So I make clear – and this was not opposed by Snap – that Snap's ownership of Gfycat is something that can be referred to in open court.

22. The second of the two matters relates to Snap's interest in GIPHY, Inc. ("GIPHY"), and there are two points here. The first is the fact of the interest itself. Here again Snap do not push back in respect of this confidential information, which they accept cannot in the course of this challenge to the CMA's decision properly be kept confidential. So here too it seems to me that we should grasp the nettle now and say that the interest that Snap had in GIPHY is a matter that can be referred to in open court, and it will not be protected by any form of confidentiality regime emanating from this Tribunal.

23. That brings me to the third point, which is the valuation that Snap attributed to GIPHY in the course of articulating its interest in that company. Here there is a degree of difficulty. There is a significant mismatch between what Meta valued the company at and what Snap valued the company at. That difference is a difference of $142 million (Snap) as against $315 million plus associated rights (Meta).

24. It seems to me that it is going to be very difficult to avoid in the final judgment making some kind of quantitative reference to the difference between these two figures. It may be that one can say that one is much, much lower than the other

or one is much, much higher than the other without putting a figure to it. It seems to me, however, that that actually does not answer the mischief, which is really that there might be inferences to be drawn from Snap's approach to third-party acquisitions or acquisition of third parties which need the protection of the confidentiality regime.

25. It seems to me that the line that I ought to draw is this. So far as the particulars of Snap's assessment of the value of GIPHY is concerned, those details must be kept confidential and protected. I have in mind particularly the details that exist in relation to the term sheet, to which reference has been made in the course of this hearing. That, to be clear, will need to be addressed in private rather than in public.

26. However, the headline figures ought to be out in the open, if only to exist as a convenient shorthand in order to articulate the difference between the amount that Snap was prepared to pay and the amount that Meta was prepared to pay for the same company. It seems to me that those figures, $142 million against $315 million plus associated rights, ought now to be in the public domain.

27. I make clear that I do not consider that it is possible to draw any inference regarding the commercial approach of Snap from either of those two figures. It seems to me that one simply has a different valuation of the same entity by two companies, which both could easily afford multiples of those amounts, if they wanted to pay them. All one has is a different value being attributed to the same entity, and I strongly suspect that anyone seeking to draw any kind of inference from the figure alone would likely be more wrong than right.

28. More to the point, I do not see any serious prospect of avoiding reference to those figures or some kind of proxy in the final judgment, and so, consistently with my approach in regard to other matters, I am going to say that these headline figures, but only the headline figures, can move into the public domain and the parties should proceed on that basis.

29. Accordingly, subject to those three points, all other confidential material, unless easily referenced elliptically (a matter that I will leave to counsel), will be handled in private session as I have described.

30. That leads me to the final point in relation to the three points of information that I have indicated should transit into the public domain.

31. First of all, it seems to me that it is right and only fair that Snap be entitled to do what it wishes with regard to the disclosure of this information in the public domain, provided that Snap understands that the window of opportunity for release of information is between now and the moment when Mr Jowell QC stands up and makes his opening case. It is entirely up to Snap what they do in that window. They may choose to do nothing, but they may choose to release this information in a manner that they wish, and it seems to me that that is something that they should be entitled to do, if they wish to do so, and in the manner that they choose, if they choose to do so.

32. That said, it does seem to me that it would be unfortunate if Mr Jowell QC's client heard for the first time these three facts from Mr Jowell QC's lips in open court rather than <u>before</u> he stands up in open court. Accordingly, it seems to me that it is right that I indicate that these facts can be disclosed to a single named person in Meta, that name to be disclosed to Snap and to the CMA, at a point of Mr Jowell QC's choosing, that is to say, immediately after this hearing or thereafter, but that this information can be disclosed only to that named person, who cannot pass it on to anyone else within Meta or otherwise until the matter is referenced in open court by Mr Jowell QC.

33. It seems to me that if Mr Jowell QC wants to extend the ability to disclose beyond that one named person, he needs in the first instance to raise it with Snap, but I hope that that is enough to ensure that Meta are not inappropriately taken by surprise by the reference of these three facts in public when this case opens.

Sir Marcus Smith
President

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

Date: 19 April 2022