IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1429/4/12/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 25 April – Thursday 28 April 2022

Before:
The Honourable Mr Justice Marcus Smith
Professor John Cubbin
Simon Holmes
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Meta Platforms, Inc.

Applicant

v

Competition and Markets Authority

Respondent

A P P E A R AN C E S

Mr Daniel Jowell QC, Mr Gerard Rothschild and Mr Richard Howell (On behalf of Meta)
Mr Josh Holmes QC, Mr Tristan Jones and Ms Emma Mockford (On behalf of the CMA)

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Monday, 25th April 2022

(10.00 am)

(COURT IN OPEN SESSION)

MR JUSTICE MARCUS SMITH: Good morning, Mr Jowell. Before you begin just the customary warning that you all have heard many times before. These proceedings are in open court. They are also being live-streamed to the extent that they are not taking place in private. Those who are watching on the live stream are very welcome, but they should be aware that there should be no unauthorised recording, whether audio or visual, of the proceedings and breach of that would be potentially contempt of court.

Thank you, Mr Jowell. Do begin.

Submissions by APPLICANT

MR JOWELL: Thank you, Mr Chairman. May it please the Tribunal, I appear for Meta Platforms with Mr Rothschild and Mr Howell. Mr Holmes, Mr Jones and Ms Mockford appear for the CMA.

This is, of course, the application of Meta Platforms under section 120 of the Enterprise Act for review of respondent's decisions contained in its report dated 30 November 2021.

As the Tribunal will have seen from correspondence, the parties have agreed, subject to the Tribunal's agreement, to group the submissions into three groupings.

In the first group we will address grounds 1, 2 and 3. All three of those grounds go largely at least to the validity of the horizontal SLC.

In the second group we intend to address grounds 4 and 4A, which mainly identify a number of procedural flaws, and amongst those flaws is the fact that the

CMA withheld, in our submission, important information from Meta, directly relevant to the investigation, including withholding for some 14 months the fact that Snap had purchased Gfycat and the fact that Snap had been interested in purchasing GIPHY, but only at a much lower valuation. So those are grounds 4 and 4A.

Third and finally, we have grounds 5 and 6, which both concern the remedy. As you will have seen from the proposed timetable, the parties have, subject to the Tribunal's views again of course, provisionally at least, agreed to spend a day and a half on each of the first groupings and then a day on the third grouping.

There are two provisos I should mention to that. The one is that whilst we have given a breakdown of the timetable, it may be that I will need to spend a little longer in opening than anticipated on both the first two groupings, in which case I accept, of course, that that will have to come out of my reply.

The other proviso I should mention is that when it comes to grounds 4 and 4A, I intend to deal with convenience, also with one part of what is the second part of ground 5, and therefore I think it is likely that we will be spending rather longer on grounds 4 and 4A and that part of 5, and therefore we will probably spill into the last day, but I think we will still comfortably complete grounds 5 and 6 in that final day, even if we need to spend the first hour on the other grounds.

Subject to that, those are our proposals for timetable. Of course, we are very much in the Tribunal's hands if you wish to deal with things differently.

MR JUSTICE MARCUS SMITH: No, Mr Jowell. We are very happy with that. We will obviously intervene as little as possible, but we will intervene when we have questions that need answering. We will endeavour to be as accommodating as possible if you do need more time. I mean we are starting

at 10.00 today, but we can also do that at other times because I wouldn't want any of the parties to feel cramped in terms of making points that need to be made. We do value the oral advocacy.

MR JOWELL: We are very grateful for that indication. I should mention that although we have agreed to parcel things up in these three sections, there are some grounds where there's an interaction between, in particular, the procedural grounds and the substantive grounds, and when there is such an interaction, obviously, I will seek to highlight that and draw it to the Tribunal's attention in the course of my submissions.

If I may, I thought it would assist if I was also briefly to set out at the outset, at least at a high level, how the various grounds fit in with the overall relief that we are seeking, and indeed with the validity of the decision as a whole.

I do so in particular in light of the Tribunal's letter, in which it enquired in particular about the consequences of a finding that the horizontal SLC is vitiated in circumstances where the procedural grounds are rejected, and essentially the letter asks whether, in those circumstances, the question of the appropriate remedy must be remitted to the CMA.

So I will try to answer that question in the course of explaining how we see at least the various grounds fitting together.

Starting off with grounds 1 to 3, these are, as I have said, largely relevant only to the finding of the horizontal SLC. Ground 2, I should mention, which relates to market definition, also has the potential to have relevance to the vertical SLC, although the respondent disputes that.

In any event, as regards grounds 1 and 3 at least, it is common ground that they go only to the horizontal SLC.

It is also common ground I think that if we are right on any of grounds 1, 2A or 3,

then the horizontal SLC finding cannot stand, because each of those grounds are independently sufficient to undermine the horizontal SLC.

MR HOLMES: In case it assists, just to say we don't dispute that ground 2B is of relevance to the vertical SLC.

MR JOWELL: I think there is a dispute as to whether 2A is relevant, but yes, it is common ground in relation to 2B.

If the Tribunal is with us on any of ground 1, 2A or 3, then certainly, on any one of them, then the horizontal SLC fall away.

But, that said, we recognise that based on the conclusions on the face of the report at least, the fact that the horizontal SLC falls away might not, without more, affect the overall outcome. That is because the report at least superficially seems to conclude that all of the same remedies that it seeks to impose would be necessary for either the vertical SLC or the horizontal SLC.

So in order to effect the overall outcome it will seem that we need to persuade you of one of two things. Either we will need to also persuade you that we are right on one of our procedural grounds in ground 4, such as the failure to consult or unlawful derogation, and those grounds are clearly also relevant to the vertical SLC.

Alternatively, we will need to persuade you of one of the matters in ground 5.

Now, ground 5 falls into two parts. The first part of ground 5 is our contention that a number of the remedies that the report seeks to impose, those that relate in particular to the reconstitution of GIPHY's revenue arm, as opposed to the mere sale of GIPHY, are plainly unnecessary and disproportionate if all that needs to be remedied is the vertical SLC.

In fact, we find it rather surprising that the CMA even disputes that. We think it is blindingly obvious that the remedies relating to reconstitution of GIPHY's

revenue arm would not be necessary if all one was concerned with was the vertical SLC on its own. So that is ground 5. We accept that we would have to succeed on it, but, as I said, we think it is a very clear and powerful ground.

There is also then the second part of ground 5. That relates to the part of the remedy that concerns only the sale of GIPHY, not its reconstitution. That concerns the question of whether the additional information relating to Snap's purchase of Gfycat has been properly taken into account in the report when it comes to the duration of the vertical SLC. Hence the need for even a sale remedy in relation to the vertical SLC.

That's a separate issue but constitutes a further independent ground of remittal, why remittal would be necessary.

I hope that broadly answers your question in the letter.

If I can then turn back to the grounds generally and how they fit together, if we don't persuade the Tribunal on any of grounds 1, 2A or 3, then we can't overturn the horizontal SLC on that basis, but it is important to appreciate that the procedural grounds 4 and 4A, or certainly some of them, also remain an independently sufficient basis to quash the decisions or purported decisions in the report as a whole on both the vertical and the horizontal SLCs.

I am not going to go into all the various permutations under 4 and 4A, because there are many of them, but certainly certain of those permutations would also clearly vitiate the horizontal SLC.

Finally, even if we don't succeed on any of grounds 1 to 3 or grounds 4 and 4A, there would still remain the points on the specific aspects of the remedies that are contained in ground 6, and those are all effectively independent grounds of review of aspects of the remedies.

That's the broad structure of our application.

As I say, I have not sought to go into every permutation. It may be that, depending upon the precise result, particularly on the procedural grounds, it will be necessary to have a further hearing in due course to resolve questions of appropriate relief.

In that regard, subject to the Tribunal's view, CMA's counsel have proposed to us, and we have agreed in principle, that assuming unlawfulness is established under any ground, it would be sensible to reserve questions as to the appropriate relief, including the question of whether relief can or should be refused in the Tribunal's discretion, for a subsequent hearing. That does seem sensible to us, certainly in light of the time constraints and the number of issues that we need to get through in this hearing, and also in light of the many different permutations of unlawfulness that the Tribunal might find particularly on the procedural side, but, of course, again we are, of course, in the Tribunal's hands.

MR JUSTICE MARCUS SMITH: Yes. Well, Mr Jowell, that's an interesting and I think helpful suggestion. What we will do is we will take that away and discuss that amongst ourselves and come back with a pretty clear direction to both parties, because it would I think affect the tail end of the judgment we have to write.

MR JOWELL: Indeed, it would. It would also affect what I intend to address you on. At the moment I am going to largely hold back on addressing you on those points that go to the exercise of discretion on remedies.

MR JUSTICE MARCUS SMITH: Well, I think for the moment proceed on that basis, because I can certainly see the attractions of both you and Mr Holmes being spared the burden of having to parse the different combinations of where we

might end up, because I think that is a recipe for confusion and disaster rather than clarity, but equally it means that we would cut short the judgment that we would hand down in quite a significant way, but again I think a helpful way, but I think we do need to be very clear that that's what we are tilting at.

So we will take that away and think about it, but we will get back to you in the course of today.

MR JOWELL: I am very grateful. Of course, we are entirely in your hands as to where you wish to end up on that.

MR JUSTICE MARCUS SMITH: Mr Holmes, are you broadly sympathetic to Mr Jowell's suggestion?

MR HOLMES: Yes, we are, sir, yes.

MR JUSTICE MARCUS SMITH: Good. If there was clear blue water between the two of you, then we would obviously want to hear a little bit more, but it does seem sensible, and if both of you are saying there's merit in it, then we will treat it in that way.

MR JOWELL: Indeed, I have to confess it was their suggestion, not ours.

May I turn then to the parties, who will by now be familiar to you.

Meta, the company that was formerly called Facebook, offers a large line of familiar online products and services worldwide. It also sells advertising globally, including in the United Kingdom, and there is no doubt that Meta is a large and successful company.

May I mention I have handed up a sheet that looks like this, which contains confidential passages that are from the decision that I intend to refer to, but not read out, because they are confidential, as I go through.

So to give you an idea of the scale of Meta's revenues in the UK, could I just draw your attention to the second confidential passage, where you will see

paragraph 2.19 of the decision is quoted. You will see the figures there for two of its main services in the United Kingdom, generating a total revenue in the United Kingdom of several billion, so several thousands of millions of dollars, and the precise figures there are confidential but are on the sheet. That is, of course, just in the UK.

GIPHY is by comparison a small United States company, founded in 2013, which was largely owned and funded by venture capitalists. It operates an online database and search engine, which allows users to search for GIFs, which stands for graphic interchange format image files, which are essentially very short videos designed to express a particularly emotion or a particular concept. It also supplies GIF stickers, which are also videos, but they are semi-transparent, so you can sort of see through them.

GIPHY supplies its GIFs and GIF stickers to users, largely via third party apps worldwide. It supplies them and has always supplied them for free. It can be compared to a number of other companies that also have a database of GIFs that they supply for free, such as Tenor and Gfycat.

People in the UK can and do access GIPHY's GIFs, usually via a third party app, just as they can and do access GIFs from other online sources, but no-one in the United Kingdom has ever bought a GIF from GIPHY. In fact, no-one in the United Kingdom has ever bought anything from GIPHY.

It is important to appreciate also that, as I have said, very few of GIPHY's GIFs are accessed by consumers from GIPHY's own website. That's what's referred to in the decision as the O&O, owned and operated channel. If fact, the vast majority of GIPHY's GIFs are accessed via third party platforms, in particular those of Meta, Snap, TikTok and others, other social media platforms typically.

MR JUSTICE MARCUS SMITH: It may not matter, but I am keen that we don't commit a technical faux pas in understanding how this works. If I am using a WhatsApp message, let us say, and I refer to that because it is one of the limited kinds of social media interaction I engage in, I can't automatically find a GIF to attach to my message. As I understand it, I need to have some sort of additional app which enables that functionality on WhatsApp. Is that generally true or if I am using Messenger or some other form of social media, it is, as it were, built in functionality for attaching GIFs?

MR JOWELL: I will take instructions so I don't get it wrong. I think I know the answer, but I want to confer. I am told that it is, in fact, built in in WhatsApp and in others.

MR JUSTICE MARCUS SMITH: That shows my incompetence rather than --

MR JOWELL: The way it works is that GIPHY supplies to third party platforms, such as Meta's platforms, what are called APIs, application programming interfaces, or SDKs, which are software development kits. That enables the platforms to integrate the GIFs into their platform services and then supply GIFs to their own customers. The result is that GIPHY has a fairly limited relationship with the end customers. It is essentially through the platforms.

Coming back then to GIPHY and to where it operates, it has never had any physical presence in the United Kingdom. It has never had any subsidiaries incorporated in the UK. It has never had any office or workplace here. It employs no staff in this jurisdiction and it has never sold any advertising in the UK. In fact, as I said, it has never sold anything here.

Now, given that GIPHY, like its main GIF competitors, Tenor and Gfycat, supplies its GIFs to platforms and to users for free, you might ask how does it survive financially? The principal answer is that it has survived financially from its

inception by successive rounds of fundraising. The last fundraising took place at the beginning of 2019. I will come back to that in a moment. It is important. But it has always survived through these essentially, largely, by these rounds of financing, and, of course, since it has been bought by Meta, in May 2020, it is Meta that has supported GIPHY financially. In the same way Tenor, its main competitor, is supported financially by its owner, Google. And Gfycat, as we now know has been bought by Snap, is supported by Snap.

Now, GIPHY did also historically have another small source of funds from which it generated some income. It generated a modest amount of revenue in the United States alone through a service called Paid Alignment Advertising. Paid Alignment gave advertisers the ability to align their GIFs with popular search terms or to insert their GIFs into a trending feed in exchange for a fee.

Now, GIPHY started selling Paid Alignment Advertising in the United States in 2017. To give you an idea of the absolute and relative size of the paid alignment business, one can take its performance at its annual high point of the year 2019. You will see the figure for its revenue in that year, which is the first of the confidential passages in your sheet.

Now, without revealing that confidential information, to give you an idea of the comparative scale of the advertising revenue of Meta, as compared to GIPHY, the revenues of GIPHY in the United States were less than 0.05%, so less than 1/20th of 1% of Meta's advertising income in the United States. It is literally miniscule.

As for sales of advertising in the UK or indeed anywhere outside the US, as I have said, GIPHY sold no advertising whatsoever and, as I said, Meta sold several billions in advertising in the United Kingdom.

Those are the parties. If I could then turn to the background to the merger. Now, as

I have said, given its small revenues, the main source of income to GIPHY came from its investors. The early fundraising in 2019 fell short of expectations as to the amount raised. Nevertheless, the fundraising was still made on a basis that valued the company at its highest point to that date, and you will see that value, as calculated by the CMA, in the third confidential paragraph on your sheet. It is the figure on the third line. It indicates a value of circa and then you will see US dollars in early 2019. That's the CMA's calculation of the valuation at which that early 2019 fundraising was made.

That was the high point of valuation. Unfortunately, after that 2019 fundraising, things didn't go to plan for GIPHY. Whilst there was some growth in revenue after that from Paid Alignment, it fell significantly short of GIPHY's internal projections, and its operating expenditure was very considerable. You will see what its annual operating expenditure was in the figures that are on the sheet in front of you, which is over the page at number 6. You will see the annual operating costs in 2019. If you look at number 4 on your sheet, you will see the monthly average loss at which GIPHY was running.

Now, because of this, revenue growth was not rising as fast as had been projected, and it is losing money at a considerable average monthly rate. One sees that, not surprisingly, notwithstanding its fundraising at the beginning of 2019, its cash runway was anticipated to come to an end and come to an end quite soon. You will see that again in CMA's estimate of when that was in the fourth passage, again on the final line, the fourth confidential passage.

To put it in a nutshell, GIPHY was very rapidly running out of money. Not unsurprisingly, in those circumstances, in October 2019, GIPHY and its investors engaged a global merchant bank, JP Morgan, to explore options for a sale or a fundraising.

As one would expect, JP Morgan, being a skilled and efficient banker, approached a large number of digital and other companies globally in November 2019. You will see those various companies listed in the confidential version of the decision at paragraphs 6.129 to 6.130 and also in footnote 729. they are, as you would expect, very large companies indeed.

Now, Meta was one of those approached. That's not very surprising at all, because not only is it a large digital tech company, it also had a very close commercial relationship with GIPHY. First of all, it was a major user of GIPHY's GIFs, alongside GIFs from GIPHY's main competitor, Tenor. It used them by integrating them, as I have explained, in the supply of its own services.

Secondly, and also importantly, GIPHY's Paid Alignment offering was very largely run on Meta's platforms, on Facebook and Instagram. So GIPHY was significantly dependent on Meta. So it was a natural fit.

In March 2020, having been approached by JP Morgan, Meta made an offer for GIPHY of some $300 million for the business.

Pausing there, it is important to note that not a single one of the numerous other companies approached by JP Morgan made a formal offer for GIPHY at any point between November 2019, when the discussions opened, and March 2020, or indeed at any point after March 2020.

It is right to say, and we now know and can reveal, that one other company, Snap, was contemplating a bid and made an informal verbal offer, but Snap was planning to offer at a level well below the amount offered by Meta, and its internal valuation in an internal term sheet valued GIPHY at just $142 million.

The CMA's report concludes that the investors would not have been prepared to accept an offer at that sort of level.

I will come on to that. It is important that the respondent never actually asked the

company in question, Snap, whether its valuation of 142 million included any value for the Paid Alignment business, and that's one of the procedural failings that we complain about.

What is clear is that the Paid Alignment business was certainly not the motivation for Snap in having an interest in purchasing GIPHY. When we come to address the counterfactual, I will show you from the evidence that it is most unlikely that if Snap had been asked, it would have said that it put any value or any material value on the revenue aspect, on the Paid Alignment aspect, of GIPHY's business.

Now, the reason that the fact that there were no other bidders, other than this possible interest of Snap at a low level, is of importance in at least two ways.

First of all, if GIPHY's Paid Alignment business truly had significant promise, if it was likely that it would have expanded internationally and profitably at any scale, one would rationally expect that at least some of these numerous large tech companies and media companies would have recognised that potential and made a bid. But none of them did. That is a point that is relevant to the first ground of review.

The fact that no other bids were made, bar that of Meta, is a matter that one would expect any rational regulator to give considerable importance to if the regulator was seeking to evaluate the likelihood that the business would grow successfully, but as we will see and as I will come on to, the regulator in this case, the CMA, apparently thinks that it doesn't have to make any such evaluation. We will say that that is a mistake of law or a misapplication of the statutory test.

The other reason why the absence of any alternative bid is significant is that it affects the third ground of review, the counterfactual.

The respondent suggests that in the counterfactual world in which Meta had not bought GIPHY, nevertheless another purchaser might have done. In particular, it advances two propositions.

First, it suggests that one of the counterfactual possibilities was that another bidder may have made a bid for the company at a sufficient level that may have been accepted by the investors.

Secondly, the report suggests that any such buyer would have had an incentive, in summary, to aggressively pursue or vigorously pursue and expand GIPHY's Paid Alignment revenue business.

The first of those propositions, when a bid may have been made high enough that it would have been acceptable to the investors, and therefore significantly higher than what Snap was contemplating, is, with respect, pure unadulterated speculation. There is simply nothing to support it.

As to the second proposition, that had such an alternative purchaser bought the company, it would have necessarily somehow had been incentive vigorously to pursue paid alignment, well, that is completely unexplained, and it is to build speculation upon speculation. What's worse than that, it is not even speculation that was made by the group that was entrusted with decision-making authority because, as I will show you, that bit of the decision is something that was inserted into the report at the very last minute, presumably by a CMA staff member, and certainly without the approval of the group as a whole.

So returning from that speculation to the real world, a term sheet between Meta and GIPHY was signed on 7th April 2020, and in May 2020 Meta acquired GIPHY for $315 million, plus an amount that was set aside in restricted stock units for GIPHY employees. You will have seen the value of that amount from the

decision. That was a figure that was significantly below the valuation of the company at the last investment round in early 2019, which I've shown you from the sheet in the third passage.

For avoidance of doubt, it is significantly below that previous valuation, whether one includes the restricted stock units for employees or not.

May I come next then to why Meta, having been approached by JP Morgan, did decide to purchase GIPHY? I would like to start, if I may, with what was not Meta's motivation.

In the course of the merger enquiry, the CMA has reviewed about 280,000 internal documents from the parties, and you will see that recorded in the decision in the summary at paragraph 20. That was a pretty comprehensive internal trawl by any measure, and for the avoidance of doubt a very substantial part of that 280,000 came from Meta and included documents produced to the FTC and produced pursuant to successive compulsory section 109 requests from the CMA.

That trawl of documents included not just e-mails. It included all sorts of internal messages and chats of practically every description you can imagine. The custodians, whose e-mails and chats and messages were searched, included a swathe of effectively all of the senior managers and directors within Meta.

Now, despite this impressive trawl through all of the internal documents, the CMA has not found a single one, not a single one, in which Meta indicates that it regarded GIPHY as a potential competitive threat, and the report also acknowledges that it has found no evidence at all of any response by Meta to entry or expansion by GIPHY, whether in the United States or anywhere in the world.

Now, these acknowledgments are tucked away and downplayed, but they are there

in the report. If I could just show you them, given their importance. If you could take volume 2, please, where the full version of the report is, and if you could go to page 746, you will see there paragraph 7.197:

"While we have not seen internal Facebook documents describing GIPHY as a threat, or evidence of any direct response to a threat of entry or expansion by GIPHY, which was removed as a result of the merger ..."

Then it goes on to say:

"... we have found evidence of Facebook's interest in monetizing GIFs and incentives to respond to potential competition."

It is the first three lines -- I will come back to the remainder of the paragraph -- that I emphasise for present purposes.

If you go forward, please, to page 760, you see at paragraph 7.242:

"We have not identified evidence from Facebook's internal documents that it perceived GIPHY as a potential competitive threat in display advertising, despite its close relationship with GIPHY."

Then it goes on again to talk about however, it is GIPHY's monetisation plan that there would be an increasing prospect, and so on.

To put it crudely, the report acknowledges that the notion that GIPHY was a competitive threat to Meta was not something that at the time of the merger even featured on Meta's radar.

Now, I acknowledge, of course, they go on to talk about an increasing prospect of it being seen as a material threat in the future and of incentives to respond to potential competition, and that's something I will come back to. But the point we would make for present purposes is at the time of the merger there is a clear acknowledgment that GIPHY was not perceived by Meta as a potential competitive threat in display advertising, and that Meta had not reacted in any

way to GIPHY's presence in the market up to that point in time.

Now, the Tribunal will no doubt be familiar with the view that has become very fashionable in certain anti-trust circles in the last few years, which is that certain big tech companies operate, in crude terms, it is said by deliberately identifying potential competitors or competitive threats and then buying them up when they're still small, in order to avoid competition.

Now, whether that hypothesis has any validity in other cases is not relevant for us, but what I do submit is that based on the findings in the report itself, that was clearly not the case here as regards GIPHY and Meta.

When the report speaks, as it does, a little mischievously of Meta terminating the Paid Alignment revenue arm of GIPHY's business, that has to be read in its proper context. In reality, all Meta did was choose not to purchase that Paid Alignment revenue arm, because it saw no value in it. It was not because it saw it as an actual or potential competitive threat. That would be contrary to the findings that you have seen in the report.

Now, the report also makes positive findings about what Meta's motivation was for purchasing GIPHY, and one sees the rationale on the part of Meta identified in the decision at paragraph 2.49. I don't intend to take it up, but it's in volume 2, page 514.

In short, according to the report, Meta's motivation was to avoid a downside and also to gain a potential upside. The downside it wished to avoid was the risk of losing the use of GIPHY's GIFs on its platforms, and the upside was the potential possible benefits of integrating GIPHY within Meta's own products and services.

Just pausing there, it's important to appreciate the logical implications of those findings. First of all, it is consistent with the fact that the purpose of Meta was

not to eliminate a potential competitive threat in advertising, but, secondly, it also entails that Meta's motivation was not, even according to the report, to somehow obtain GIPHY and then cut off social media competitors from the provision of GIPHY's GIFs. Indeed, its conduct subsequent to that has shown that. It entered into, as you see the report notes, that it almost immediately entered into a five year agreement with Snap for the provision of GIPHY's GIFs.

In fact, the position was the reverse. Meta wished to ensure against the possibility that it would lose access to GIPHY's GIFs, in particular if GIPHY went out of business.

The report finds both that Meta's motives were not to eliminate a competitor, because, as I say, there's no evidence that Meta even had GIPHY on its radar as a competitive threat, and, secondly, the report also tacitly finds that Meta's motive was not to foreclose competitors from GIPHY's services.

So despite all of that, the report nevertheless concludes, in essence, that the merger is likely to have both of those two effects, and that follows from the two forms of substantial lessening of competition that it identifies. The first, the horizontal SLC, suggests that the merger will give rise to a substantial lessening of competition in the supply of display advertising in the UK, because it finds that Meta is eliminating an actual or potential dynamic competitor in display advertising.

The second, the vertical SLC, suggests the merger will give rise to a substantial lessening of competition due to the likely foreclosure of supply of GIFs from GIPHY to Meta's social media competitors here in the UK.

So there is a complete mismatch really between what the internal documents show and the findings on motivation and the SLCs that have been found in the

report.

May I come on next by way of introduction to the law. The law consists in the statutes and also in the general law. During the course of today, other than section 35 of the Enterprise Act, which I will turn to shortly, I don't intend to go through the statute. I am afraid tomorrow I will forewarn you I will have to go through the statute in some detail when it comes to the procedural grounds.

The general law relevant to the first three grounds is to a certain degree at least uncontentious.

Under section 120 (4) of the Enterprise Act, in determining an application of this nature, the Tribunal is to apply the same principles as would be applied by a court on an application for judicial review. In selecting and formulating our grounds for review we have had that very well in mind and we are very cognisant of the fact that this is not an appeal on the merits. Therefore, what we have sought to do is to identify a number of hard-edged legal errors on certain points where the respondent enjoys no margin of discretion, in particular as regards misapplication or misinterpretation of the statute. Beyond those errors of law, we have had to exercise considerable restraint.

It may not surprise the Tribunal to know that there are many, many factual findings in the report that Meta and its legal representatives take profound issue with. Some of those are central to the reasoning in the decision. Nevertheless, in the case of the vast majority of those findings or evaluations, although it has taken Herculean restraint I have to say on the part of Meta and its legal advisers, no challenge has been brought. We would certainly have done, had there been an appeal on the merits available, but we accept that many of these errors are not so manifestly wrong that they amount to an error of law.

The challenges that the respondent does make are limited to those instances where

the assessments are so flawed, so outside the bounds of reasonable discretion, that they are unlawful.

It is important to bear in mind that even in a judicial review, the respondent's margin of discretion or appreciation is not limitless.

If I may just show you one fairly recent authority in that regard. It is the succinct but I would respectfully suggest profound summary of the irrationality ground of judicial review found in the judgment of the Divisional Court consisting of Lord Justice Leggatt and Mrs Justice Carr, as she then was, in the Law Society v the Lord Chancellor case, which is in volume 4 of the authorities bundle at tab 75.

I just wish to draw your attention to one paragraph of this, which is in the bundle at page 2573.

"The second ground on which the Lord Chancellor's decision is challenged encompasses a number of arguments falling under the general head of irrationality or, as it is more accurately described, unreasonableness. This legal basis for judicial review has two aspects. The first is concerned with whether the decision under review is capable of being justified or whether, in the classic Wednesbury formulation, it is so unreasonable that no reasonable authority could ever have come to it. Another simpler formulation of the test which avoids tautology is whether the decision is outside the range of reasonable decisions open to the decision maker.

The second aspect of irrationality on reasonableness is concerned with the process by which the decision was reached. A decision may be challenged on the basis that there is a demonstrable flaw in the reasoning which led to it, for example, that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning,

or that the reasoning involved a serious logical or methodological error. Factual error, although it has been recognised as a separate principle, can also be regarded as an example of flawed reasoning, the test being whether a mistake as to fact which was uncontentious and objectively verifiable, played a material part in the decision maker's reasoning."

One of the approaches that the respondent seeks repeatedly to deploy in its defence and indeed in its skeleton argument is to refer to the relevant facts on findings in the decision, whether that be we consider that there is a substantial lessening of competition or we consider that GIPHY would have continued to monetize its GIFs and pursue expansion, and then effectively they say: "Well, in a judicial review, you can't possibly go behind that finding, unless perhaps it is manifestly perverse or the decision maker has taken leave of their senses."

In our respectful submission, that ignores the second aspect of unreasonableness that is identified in this passage. The mere fact that the report sets out a factual assessment that is not obviously ridiculous does not suffice entirely to immunise that finding from scrutiny of the underlying reasoning leading to that conclusion.

Even within the confines of a judicial review, one is not precluded from considering whether obviously irrelevant factors have been taken into account or whether obviously relevant factors have been left out or, indeed, that critical steps in the reasoning are absent or findings necessary to support the conclusion are absent.

As the Divisional Court observed in that case, the courts can and do and indeed must scrutinise whether there are demonstrable flaws in a reasoning that led to an assessment, in particular where there is no evidence to support an important step in the reasoning or where the reasoning involves serious

logical or methodological error.

Against that background, may I then turn to ground 1, our first ground? What I would like to do, if I may, is to briefly summarise it and then take you back in more detail through it.

We put this ground in two ways in our application. The first way we formulate it is to say that the respondent has misremembered or misapplied the statutory request, which requires a substantial lessening of competition, on the balance of probabilities, in the UK market.

The second way we put this ground is to say that there is, in summary, a void at the heart of the reasoning and the evidence relating to the horizontal SLC. The void consists in the report's total failure to make any assessment whatsoever of the likely degree of success or extent of expansion of GIPHY in the counterfactual, whether in the UK market or in the US market.

Now, the CMA in their defence and skeleton argument also, it seems to us, put their case in two ways. Their principal argument is that GIPHY was an existing dynamic competitor, as they put it, and that its removal thereby constituted a loss of existing and ongoing dynamic competition. You will see that in paragraph 23 of their skeleton argument. That they say, it being an existing competitor, is the basis for the horizontal SLC.

Now, the problem with that approach, as I will show you, is that it is contrary to two statutory constraints. The first statutory constraint is the requirement to show a substantial lessening of competition. The second is the requirement to show a substantial lessening of competition on a UK market.

Given that there was no evidence or indeed there was no participation by GIPHY on the UK display advertising market pre-merger, and given that there was, as I have shown you, no evidence of any effect from GIPHY's existence on Meta

that did participate in the relevant UK advertising market pre-merger, we say that the CMA's principal approach, based on supposed existing dynamic competition, must be contrary to those two requirements in the statute.

The other way the CMA put its case, and I think they still put it this way as well, and this is certainly how we have always read the report, is that the merger will lead to a substantial lessening of competition in the future, because of the removal of GIPHY as a potential competitor and what may in the future happen.

That approach is flawed because, given the statutory requirements and the fact that there was, as I have said, no existing substantial competition from GIPHY on the relevant UK market, the CMA could only lawfully reach that finding if it took into account a plainly relevant consideration or embarked upon a manifestly essential line of enquiry that any rational regulator would have embarked on, given the statutory test, and that was an enquiry, as I have said, into the likely degree of success or the likely extent of expansion, future expansion, of GIPHY in the counterfactual.

Now, the CMA in its decision denies that any such enquiry had to be made. Again, the way this is justified by the CMA, in its skeleton argument, is largely on the basis that it is because it considered that GIPHY was already, pre-merger, an important dynamic competitor. As is says in paragraph 31 of its skeleton, it claims that it had already found that GIPHY was a material competitive threat to Meta, by reason of being what it calls an important dynamic competitor pre-merger.

We say that that premise is demonstrably wrong. There is no evidence in the report that pre-merger GIPHY was either (a) present on the relevant UK market or (b) having any impact, let alone any substantial impact on the relevant market.

It follows that consideration had rationally to been given to its future growth prospects and the potential reaction by the incumbent. The reasons that the report gives for not carrying out that essential enquiry are manifestly inadequate, and in particular, insofar as it is alleged that GIPHY was an important dynamic competitive in a market in the United States, not in the UK, but in the United States, we say that that is legally irrelevant, and in any event no such market in the United States has been properly analysed.

Those are the key legal issues between us on the first ground. If I may now just take you through that in more detail, step by step.

If I could start with the Act, and section 35 of it, which is in volume 1, tab 5 of the authorities bundle. If I could invite you to go straight to section 35. You will see that the group must decide the two statutory questions in section 35 (1), namely, whether a relevant merger situation has been created and, if so, "whether the creation of that situation has resulted or may be expected to result in a substantial lessening of competition with any market or markets in the United Kingdom for goods for services".

If the group decides there is an anti-competitive outcome, in other words, both of those conditions are satisfied, the group must decide what action should being taken by it under section 41.

We do not challenge the finding under section 35 (1) (a) that a relevant merger situation has been created.

What we do challenge is the finding under section 35 (1) (b) that 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.

You will observe that there are three elements to that test, each of which represents

a statutory constraint on the respondent's ability to make a finding under Section 35 (1) (b).

The first of those constraints is the language of section 35 that refers to "either has resulted or may be expected to result".

Now "has resulted" reflects that in some cases a completed merger has already given rise to an SLC. Given the way the CMA puts its primary case, I think it is saying that that is the case here. I will come back to that. The other possibility, "or may be expected to result", inherently requires a forward prediction or projection.

As has been confirmed by the Court of Appeal in the IBA health case -- I don't think I need ask you to take it up, because it is common ground, but it is in the authorities bundle at tab 41 of volume 2 -- the Court of Appeal has confirmed that the words "may be expected to result" involves a degree of likelihood amounting to an expectation or, crudely put, a more than 50% chance.

So it is common ground, and indeed it is stated in the report to be common ground, that the respondent must either be satisfied that a substantial lessening of competition has already occurred as a result of the merger, or it must make a prediction or projection of a substantial lessening of competition in the future, on the balance of possibilities.

So it is not enough to establish that there is a possibility or a mere prospect of a substantial lessening. The substantial lessening must be more probable than that. So that is the first constraint, and obviously that is a real constraint.

The second constraint is that in order to prohibit a merger, the respondent has to establish not just a lessening of competition, not just of any competition, but a substantial lessening of competition, and the term "substantial" is meaningful. It is a real qualification that must be respected.

My learned friend quotes in his skeleton argument from two cases, from the Global Radio case that itself considers the meaning of "substantial" and also from the South Yorkshire Transport case, which is the House of Lords' judgment that the Global Radio case follows. He notes that the Global Radio case confirms that the criterion of substantiality does not necessarily mean large or very weighty. He cites also from Lord Mustill's speech in South Yorkshire to the effect that the word "substantial" is a protean concept, ranging from not trifling to nearly complete, and that the House of Lords eventually formulated the test as "worthy of consideration for the purpose of the Act".

Now, it is important actually to read that judgment with a little care, because it's easily misunderstood. It is correct that the House of Lords in that case did say that in general terms "substantial" is a protean concept ranging from not trifling to nearly complete, but it did not accept that for the purposes of this Act it could have that full wide range of meaning, and, in fact, when one reads it carefully, as I will take you to in a moment, it makes it clear that if the decision maker proceeded on the basis that "substantial" means no more than trifling or no more than de minimis, that would have been a clear error of law.

If I could show you that, it is in the first authorities bundle at tab 25. If I could invite you to go to page 576 in Lord Mustill's speech. If I can take it from the top of the page:

"Approaching the first stage as a matter of common language, no recourse need be made to dictionaries to determine that 'substantial' accommodates a large range of meanings. At one extent there is 'not trifling'. At the other there is 'nearly complete', as when someone says that he is in substantial agreement with what has just been said. In between there exist many shades of meaning, drawing colour from their context. That the protean nature of the

word has been reflected in the decided cases is I believe made quite clear by the judgment of Mr Justice Otton, in which the authorities are so thoroughly discussed as to make it unnecessary to go through them again. It is sufficient to say that although I do not accept that 'substantial' can never mean more than de minimis or that in Palser v Grinling Viscount Simon was saying that more than in the particular statutory context it did not have this meaning, I am satisfied that in section 64 (3) the word does indeed lie further up the spectrum than that. To say how far up is another matter."

Now there are an awful lot of double negatives in that key sentence, but what Lord Mustill is recognising there are that there are limits to the extent to which the protean concept of substantiality can be stretched. You see that in particular it does not mean in this context no more than more than de minimis.

One see that he then goes on to adopt Lord Justice Norse's expression of "worthy of consideration for the purposes of the Act".

Then you will see that he confirms that in the first sentence of the next paragraph, which is critical. He says this:

"Thus far, therefore, I accept the respondent's submission that if the Commission proceeded when examining its jurisdiction on the basis that it was enough for the reference area to be more than trifling, this was a radical misconception."

So he is recognising that it would be an error of law to say that "substantial" in the context of the Act means no more than more than de minimis or more than trifling. If that had been the authority's understanding, and if it had applied that understanding, that would have been wrong, as a matter of law, and the court would have had to step in to correct it.

What Lord Mustill says later about his speech about the application of the Wednesbury test to the application of the term is subject to that important

qualification.

So the CMA is not Humpty-Dumpty. It is not able to say that "substantial" means whatever it wants it to mean. It can't say that "substantial" means something that is de minimis. In fact, it can't even say that something is substantial purely because it is more than de minimis or for that matter small or for that matter modest.

The Global Radio case, which you will see in volume 3, says nothing to contradict that. If you go to volume 3, tab 61, please, you will see at page 1844, one sees in paragraph 15 it quotes from the Competition Commission's then guidelines. You see in the last -- where it gives its understanding of a substantial lessening of competition. You will see the last sentence on the page:

"A merger gives rise to a substantial lessening of competition where it has a significant effect on rivalry over time, and therefore on the competitive pressure on firms to improve their offer to customers or become more efficient or innovative. A merger that gives rise to an SLC will be expected to lead to an adverse effect for customers. Evidence on likely adverse effects will therefore play a key role in assessing mergers."

Well, those were the days. One then sees the submission of Global, which was quite an ambitious submission, that "substantial" means more than that. It means large, considerable or weighty. You see that in paragraph 18.

Over the page, at paragraph 21, one sees there that it refers to the Palser v Grinling case and then refers to the case I have just taken you to, the South Yorkshire case, where it notes that "substantial" was not held to mean large, substantial or weighty in that case. It quotes, you see from the passage with the double negative that I have already taken you to also in paragraph 21.

Then one sees paragraph 23 Lord Pannick accepted that he needed to distinguish that case, the South Yorkshire case, and he sought to do so. But we see over the page, paragraph 24 (1) that that is rejected. Effectively, they accept that:

"When a word is used more than once in a piece of legislation, it is presumed to have the same meaning throughout unless the contrary intention is shown."

So they say "substantial" in "substantial lessening of competition" means the same as effectively "substantial" in "a substantial part of the UK", which is what was in issue in the South Yorkshire case.

We see then in paragraph 24 (3) on page 1849, you will see the last two sentences:

"It cannot be assumed that Parliament intended the Commission to be able to intervene in merger situations satisfying these criteria only if there were a large lessening of competition in absolute terms. To the contrary, Parliament might be anticipated to have intended that a significant lessening of competition should suffice, regardless of whether the lessening of competition was large in absolute terms."

So Global Radio is really just following South Yorkshire. It uses the synonym of "significant" or "substantial" but nowhere does it cast any doubt on the point that is made very clearly in South Yorkshire that more than de minimis is not enough for something to be substantial. It does have to be of some significance, some real significance.

That is the second constraint.

Of course, insofar as the CMA is suggesting whether in its guidelines or in its report that merely because Meta is itself a company which it finds to have significant market power, that in those circumstances it is entitled to say, "Well, when you have a company with significant market power, we can say that any lessening of competition is substantial", we say that is an error of law.

On the current statute, there is not one test for companies with significant market power and another for other companies. In all cases there must be a substantial lessening of competition. It is not enough in any case for that to be more than de minimis in order to satisfy that requirement. The substantiality criterion applies to all mergers alike. There is not, under the current regime, some special rule for large digital tech companies where the substantial criterion and requirement is removed.

The third constraint in the statute is provided by the words "within any market or markets in the United Kingdom for goods or services". That means that the substantial lessening of competition must be established both on a relevant market and also that the relevant market must be in the United Kingdom. Section 22 (6) of the Act provides that:

"A market in the UK includes references to a market that operates in the UK or part of the UK and also in another country and/or in another territory."

So one can have, for example, a finding that the relevant market is supranational, that it is global or European, as long as that also includes the UK within it or a part of the UK within it. But in the present case it is not suggested in the report that the relevant market on which it is alleged there has been a substantial lessening of competition is supranational.

The relevant market is identified in the present report as being the UK display advertising market and it is identified as being a national market. You will see that in the report at paragraph 5.185, for your note, which you will find in the report at volume 2, page 619.

So we have a national UK display advertising market, on which it is posited there is a substantial lessening of competition.

What is not acceptable, what is outside the limit of the statute, is for the CMA to find

a substantial lessening of competition in a different digital advertising market, in a different jurisdiction. The substantial lessening of competition has to be in the UK display advertising market.

We say these constraints, and particularly the last two I have mentioned, the substantiality requirement and the UK market requirement, are each fatal to the CMA's primary case that there has been already an SLC caused by the removal of GIPHY, as what it calls an "important dynamic competitor pre-merger". It is really not very difficult to see why. GIPHY has never sold any advertising in the UK pre-merger.

Now, one way to look at that is to say: "Well, if the CMA were approaching this in a conventional way, where you had a merger of possible horizontal competitors, what would be the first thing that the CMA, as an authority, would do?"

Well, it would typically consider what are the market shares of the two merging parties, and it would say: "Well, what is the increment when you merge them that is caused by the merger on the relevant market?"

It might then also go further and make some calculations based on concentration ratios of all participants in the market. Well-known to the panel will be Hirschman-Herfindahl concentration ratios and so on.

If that had been done in this case, let's imagine what it would have said. It would have said GIPHY's market share on the UK digital advertising market in the UK is zero, and so it would follow that any increment would be zero.

We don't say that that's necessarily the end of the matter. One can see that theoretically, even when you have a company that's not operating at all on the relevant market, one could say, well, its mere existence somewhere else might conceivably have a substantial effect on competition in the UK market,

but that could only be the case if the existence, in other words, the mere presence of that competitor, as a potential entrant, significantly affects the competitive behaviour of other firms that are operating on the market in the present day.

So, for example, if the incumbent firms perceive that the other company is liable to enter into the UK market, and if it did it would pose a material competitive threat on that market, well, then one could see that they might be changing their competitive conduct in the present day in response to that. One can see that this is theoretically possible.

The problem in this case for the CMA is, as I have shown you, they concede that there is no evidence and there is no finding that Meta ever regarded GIPHY as a potential competitive threat or that it responded to any threat of entry or expansion by GIPHY. There is no evidence also, certainly no finding, that any other competitor on the UK display advertising market did so either. In our respectful submission, that is just logically an end to their primary case.

GIPHY was entirely absent from the relevant market. The conduct of the existing competitors was not affected. It must follow that competition was not substantially lessened pre-merger. In fact, it can't have been lessened at all, and it really is that simple.

Now, it is quite right to say that GIPHY was before the merger selling advertising in the United States, but that was a separate geographic market. That was not the relevant market as found in report. There is a slightly concerning -- more than a hint in the report that actually it is that competition in the United States and the reduction of that competition in the United States that is really the true focus of the concerns of the CMA.

If I could just show you that first in the report on page 679. You see paragraph 7.12:

"The importance of GIPHY as a potential competitor in display advertising and hence its importance to dynamic competition depends on a range of factors, including the efforts it would have made to expand in the display advertising market, the value of its efforts to innovate, the likelihood of the expansion of its monetisation activities, the extent to which GIPHY may have stimulated innovation and competition by third parties, the extent to which it may have been a competitive threat to Facebook and Facebook's incentives to respond to this threat."

Then you see it goes on:

"While the competitive process of innovation and the development of products by global players such as GIPHY and Facebook take place at a global level, such that developments will also be reflected in the UK, sales to customers occur at a national level."

Then, if you go forward to page 739, please, you see paragraph 7.182. This is the key paragraph for this point of view:

"In addition, we note that the importance of GIPHY to the dynamic competitive process includes any innovations or efforts by incumbent firms made in response to GIPHY, and these would not necessarily be limited to the United States, even if GIPHY did not expand internationally. For example, Facebook is already present in the UK display advertising market and efforts by Facebook to improve its services in response to GIPHY's efforts, for example, in the United States, would potentially also benefit UK consumers."

So what it appears to be saying there is that the CMA is relying on a dampening of innovation and competition outside the United Kingdom, in the United States, that is then reflected in the United Kingdom in the form of benefits to UK consumers.

There are two difficulties with that analysis. The first is that it falls outside the territorial scope of the respondent's powers to consider or to rely on a lessening of competition in a non-UK market.

Unless there is a lessening of competition on the UK market, the statute is simply not concerned with it. Indirect benefits to UK consumers from extraterritorial competition on a foreign market are irrelevant.

My learned friend says in his skeleton argument I have no authority to support that, but, with respect, I do. I have the authority of the statute.

The interveners have mentioned comity, but in my respectful submission one does not require considerations of comity, because the territorial limitation is quite clear on the face of the Act. If someone is a competitor in another market overseas and lessens competition in a market, that is neither here nor there. That is a matter, the lessening of competition in that other market, that non-UK market, is a matter properly for another regulator in another jurisdiction.

MR JUSTICE MARCUS SMITH: Is that dependent on how one defines dynamic competition? I mean, my understanding of your definition of dynamic competition is it is focused on a potentiality, but a potentiality that needs to be established to a certain standard or level.

MR JOWELL: Yes.

MR JUSTICE MARCUS SMITH: Now, granting for the moment that that potentiality would have to be established in a UK market --

MR JOWELL: Yes.

MR JUSTICE MARCUS SMITH: -- presumably you would accept that what is going on in, let us say, the United States market, actually going on, might inform what would be the dynamic competition in the UK market in the future.

MR JOWELL: Yes, but you need to establish the existence of the interaction.

MR JUSTICE MARCUS SMITH: Sure.

MR JOWELL: As I come on to, the problem is when one sees that finding, that Meta didn't regard them as a potential competitor, that cuts the possibility of any such interaction. I am going to come on to dynamic competition, if I may, when I come to their alternative case, their secondary case.

The other difficulty, of course, with this line of approaching matters, of saying: "Well, there's been a reduction of competition in the United States market and that can feed through to benefits or lack of benefits to UK consumers", the other problem, aside from the fundamental statutory problem, is that if they had wanted to go down that route, it requires a proper, full analysis of the United States market for advertising, and they have not done that. They haven't even sought to assert that there is a display advertising market in the United States rather than a market that is a single advertising market for display and search advertising. Still less have they sought to establish the sort of role that GIPHY plays in that United States market.

It is not surprising that they have not done that, because it is not their role, but if they had wished to go down this route, then it would have required a full and proper analysis of GIPHY's prospects of success and of the market definitions in that US advertising market, and that just is simply not done in the report.

So that is really our short answer to their primary case.

I am going on to come on next, if I may, to these two concepts of potential competition and dynamic competition.

I see the time. I am about halfway through. If that's a convenient moment for the Tribunal.

MR JUSTICE MARCUS SMITH: That's very helpful. I make it 11.35. We will rise

for ten minutes.

(Short break)

MR JUSTICE MARCUS SMITH: Mr Jowell.

MR JOWELL: May I turn next to the concept of dynamic competition, which is the key concept that the CMA invokes for its analysis.

Dynamic competition, as a general matter, is a concept that is not easily defined or applied. At its highest level the term "dynamic competition" can be used to refer, as the panel will be aware, to a whole way of thinking about industrial economics, one that has its origins in the Austrian School of Economics of thinkers like Hayek and Schumpeter, emphasising the importance of rivalry, innovation, and entrepreneurship. It may be contrasted with the neoclassical or static approach with its emphasis on concepts of perfect competition and market structure.

The attempt to integrate the scholarship of dynamic competition into merger control and in relation to technology markets in particular are relatively recent and controversial.

The role that dynamic competition can play in UK merger control is, of course, constrained by the statutory context and, in particular, absent an amendment to the legislation that I have shown you, it cannot depart from the statutory test with the three constraints that I have shown you.

Now, whether the statutory test should be changed is, of course, an important policy question for Parliament, and it is one that the Furman report recommended, as the Application Developers' Alliance Statement of Intervention has noted. But the Tribunal's task is just to apply the existing law, by which I mean the statute.

Now, the CMA has sought in its recent guidelines to set out how it sees the concept

of dynamic competition, and it makes repeated reference and reliance on this in its skeleton argument and defence.

So if I could show you it, it is in volume 6 of the authorities bundle. I am just searching for the reference. Tab 106 at page 4120.

Now I do recommend that the Tribunal reads these paragraphs from 5.17 to 5.24 at its leisure, but because I am a little pressed for time, I think I what I may do with your permission is to highlight certain features of these paragraphs that we reply on.

We suggest that the heart of the concept, at least as described in these paragraphs, and for present purposes, is the idea of an interaction that can arise between an existing incumbent and an actual or potential entrant, particularly an entrant that is investing in a new product.

One sees that in particular at paragraph 5.18. One sees:

"Where there is investment and innovation efforts that can lead to dynamic competitive interactions between existing competitors and potential entrants that are making efforts to enter or expand, i.e. dynamic competitors, existing firms may invest in the present in order to protect future sales from dynamic competitors."

So the notion is that the existing incumbent may perceive a competitive threat and change its conduct now, in anticipation, effectively as an anticipatory response now to that competitor, in order to protect its future profits.

One sees this expressed again in the next paragraph, 5.19 (a) over the page:

"A merger involving an existing supplier and a dynamic competitor may lead the existing supplier to reduce its efforts in the present to protect against the possible impact of the dynamic competitor, as any future loss of sales to the dynamic competitor would not reduce the profits of the merged entity."

Just pausing there, we see that the guidelines are quite careful in their language really at this stage and in every stage, to be saying they are not saying that this competitive interaction will always exist or even generally exist. They say it can lead or may invest or may lead.

It is clear that it implicitly also recognises that there are certain conditions that must be met before this competitive interaction can arise. One of those conditions, we respectfully suggest, is that if the positive dynamic competitor is not perceived as a competitive threat by the existing incumbent, then there logically can be no interaction.

Similarly, if the future competitor is just too small or too weak to be a significant competitive threat in the future, then the same will apply.

It is not always going to be rational for the incumbent to change its conduct now to meet a future innovator or investor. It must depend on the existing incumbent's assessment of the future impact of the new entrant.

If one continues in the guidelines, in 5.20, one sees it is noted that:

"Uncertainty as to the outcome" -- this is the second sentence -- "of a dynamic competitive process does not preclude the CMA from assessing the impact of the merger on that dynamic process."

Now, we accept that, as far as it goes, a mere uncertainty does not preclude an assessment. In fact, we positively rely on it. But at the same time that statement can't remove the statutory requirement to establish that there will be, on the balance of probabilities, a loss of substantial competition. So the loss of substantial competition in the future may be uncertain, but it must still be more probable than not, if it is to be invoked as a basis for prohibiting the merger.

Now, in the present case, Meta is the existing supplied, of course, and GIPHY is said

by the CMA to play the role of an existing dynamic competitor. I have already pointed out the logical difficulties with that, given the undisputed facts. It wasn't present on the UK display advertising market and GIPHY was not perceived or recognised as a competitive threat by Meta, and therefore had not altered its conduct in any way. So there was no existing competitive interaction.

If one uses the term as these guidelines intended, GIPHY cannot, in our submission, be characterised as an existing dynamic competitor in the UK.

At best, it might be said to be a potential dynamic competitor in the UK, but if the CMA wants to use "dynamic competitor" as a synonym for simply any company that it perceives as supplying any innovative product anywhere in the world, well, I can't stop it from doing that. But the point we would make for present purposes is simply there is just no evidence anywhere in the report that GIPHY was having a competitive interaction with Meta or stimulating any competitive response from Meta on any advertising market anywhere.

So then, when you don't have an existing competitive interaction, how then does one determine whether it is likely that a competitive interaction will arise in the future, a competitive interaction that one has to bear in mind will have a substantial effect on competition? The answer, in our submission, is that the authority has to assess whether it is probable that the new entrant would succeed and grow to a sufficient extent that it would be liable to elicit a substantial reaction from the existing incumbent.

That entails that the regulator had to make an assessment of the likely prospects of the new entrant and the extent of its future expansion to see whether it would become or would be likely to become a credible competitive threat and whether it was likely that the incumbent would respond significantly to that

competitive threat.

Now, the report doesn't agree with that, and I will come back to its reasoning, but in the guidelines the key passages they rely on are paragraphs 5.22 and 5.23. These bear some careful reading, because when you read them carefully, it becomes apparent, in our view, that the report has not faithfully applied them.

If I could start with the first sentence of paragraph 5.23, it says this:

"The likelihood of successful entry by a dynamic competitor and the expected closeness of competition between a dynamic competitor and other firms are both relevant to the constraint exerted by a dynamic competitor on other firms and the CMA will take this into account."

Just pausing there, the CMA is saying it will take these two matters into account, not may, but will. So it is saying, according to its own guidelines, it is mandatory to take them into account.

One of the things that it says it will take into account is the likelihood of successful entry. So not just entry per se, but successful entry. In order to determine whether it is likely the entrant will be successful in the market, we say it is surely implicit, if it is not successful or present currently, one has to assess the extent to which roughly its sales would be likely to grow in the future, and that is something that the report fails to do.

Next, the guidelines say this. They say:

"The elimination of a dynamic competitor that is making efforts towards entry or expansion may lead to an SLC, even where entry by that entrant is unlikely and may ultimately be unsuccessful. That may be the case if, for example, there is evidence that the competitor's entry or expansion would have a significant impact on the other firm's future profits. In such circumstances, the removal of the threat of entry may lead to a significant reduction in

innovation or efforts by other firms to protect those future profits."

This is the critical language relied on in the report, or at least what they do in the report is to take one sentence of that out of its full context and rely on that.

When you look at all of those sentences together, they actually don't detract from the previous part, which says that you have to assess whether the entry would be successful. It is just saying that even if the CMA reaches the conclusion that entry would ultimately be unsuccessful, that is not always determinative. But it is tolerably clear from the context that the CMA is here describing a special case, not the general case. In the general case, the constraint will exist when the entry is likely to be successful. It may be a constraint will exist in certain circumstances when the entry is unlikely or the entry is ultimately unsuccessful.

If gives a particular instance on when that special case might arise, and that is when the entry or expansion would have a significant effect on existing firm's profits. So by removing that threat of entry one may find the existing firms act differently.

To put it simply, it is saying: "Look, you might assess the extent of success of an innovative new entrant, and if you are an incumbent you might say, well, they only have a 40% chance of success, so less than evens, but goodness me, if they succeed, then they are going to take a huge amount of profits from us. So, therefore, we must respond to them now."

That's really what the CMA in its guidelines is surely getting at here.

There's no other circumstances in which entry that is unlikely could plausibly prompt a change in the conduct on the part of the existing competitor. It has to perceive that the size of the threat is sufficient that even if it is unlikely, it is going to affect it. That makes economic sense. It makes common sense.

This sort of approach that you have to look at, whether it would have a significant effect on the existing firm's profits, is also mirrored in EU merger control.

If I could just show you that very quickly, if you go to volume 8 of the authorities bundle. Tab 123, at page 5728, one sees under the heading "Merger with a potential competitor", and you see paragraph 60:

"For a merger with a potential competitor to have significant anti-competitive effect, two basic conditions must be fulfilled. First, the potential competitor must already exert a significant constraining influence, or there must be a significant likelihood that it would grow into an effective competitive force. Evidence that a potential competitor has plans to enter a market in a significant way could help the Commission to reach such a conclusion."

So on the EU's approach also the CMA was obliged to consider whether GIPHY would grow into an effective competitive force, and that obviously requires an assessment of GIPHY's growth prospects.

If one turns to the report, one sees how the CMA looked at this. It is in the report at paragraph 7.14, which is on page 680. They say:

"As part of our assessment we are considering whether the merger, by removing a potential competitor, has reduced the potential competitive pressure faced by Facebook in the UK display advertising market, thereby affecting the ongoing dynamic competitive process."

Then look at footnote 825:

"On that basis we disagree with the parties' submission that the CMA cannot find an SLC in this context unless it is more likely than not that absent the merger, GIPHY would within a reasonable timeframe have evolved into such a meaningful advertising competitor in the UK that its acquisition could

substantially lessen competition. There may be a loss of dynamic competition, even if such an outcome was uncertain."

So they disagree with the assertion that they could only find an SLC if it was more likely than not that, absent the merger, GIPHY would within a reasonable time-frame have evolved into a meaningful advertising competitor in the UK. We say that's just simply contrary to the statute.

One can't invoke the concept of dynamic competition like a magic wand say "Abracadabra. We have passed the statutory test".

In the main text you see what they do is to seize on that second sentence of paragraph 5.23 of the guidelines in isolation.

I invite you to read 7.15 to 7.17 to see their reasoning and again 7.27 to 7.29. I am not going to read it all out to you, but I am sure you will wish to read it.

We say what it does is to take that one sentence from the merger guideline about uncertainty and the possibility that in a special case an entrant may be unsuccessful, and to use that to give itself a sort of carte blanche to make a finding of an SLC, absent any assessment of the degree to which future entry and expansion would be successful or whether such entry or expansion would be likely to have a significant effect on Meta's profits.

We say that's not in accordance with the guidelines. It is not in accordance with common sense, and it doesn't accord with the statute, most importantly of all, because it would denude the requirements of a substantial lessening of competition and the requirement that that should be established on the balance of probability of any content. A critical step in the analysis has just been skipped over.

It is important to note that we provided to the CMA evidence from frontier economics based upon some very conservative assessments of the likely prospects of

GIPHY's future market share, based upon the United States projections, very optimistic, ambitious, United States projections for GIPHY's market share in the United States, extrapolated to the United Kingdom. One sees those estimates in the report at paragraph 7.106 and 7.185 as well.

You will see there that the market shares that they calculate are absolutely miniscule. They are not in any way, shape or form substantial. What the CMA do in the report in paragraph 7.185 (e) and following is effectively to say that: "Well, we don't agree that those forecasts are robust", but what they don't do is to make any kind of forecast themselves. They just say: "Well, there would have to be a large range if we were to make an assessment", but, with respect, that is just not good enough, because the fact that there is a range, that they may have given rise to a range, is just intrinsic in the nature of the sort of forward-looking exercise that one is necessarily involved in when asking whether a substantial lessening of competition may be expected to result.

If they had, for example, concluded that in their range there was, say, a probability of GIPHY becoming, say, 0.2% of the display advertising market, but an outside chance that they might have got to as high as 0.6%, they would not then rationally have been able to come to the conclusion that the absence of that player on the UK market would amount to a substantial lessening of competition. They can't avoid that by simply ducking the issue and refusing to make any kind of projections.

So that's what we say about the second way that they put their case. If I may, as it were, use an aquatic metaphor, the presence of a large shark in the water might be sufficient to change the direction of a whale. One can see that. But the presence of a goldfish in the water is never going to change the direction

of a whale. It doesn't help if you say: "Well, that goldfish might have grown into the size of a trout". It still wouldn't change the direction of the whale.

That's effectively the difficulty that the report simply doesn't grapple with. They do not make any assessment of the growth prospects of GIPHY, and yet an assessment of a forward-looking substantial effect on competitive cannot exist without that finding. There is an evidential hole in the finding.

Before I move on to the next ground --

MR JUSTICE MARCUS SMITH: Before you move on, just to articulate a few propositions or thoughts so that I can gauge the extent to which you disagree with them and can push back.

MR JOWELL: Yes.

MR JUSTICE MARCUS SMITH: First of all, it seems to me that the guidelines, whilst undoubtedly something to read with care, have got to be subordinate to the proper reading of the Act. I am not getting very much pushback from you on that. So we are really trying to work out what the Act means rather than what the guidelines might say the Act means.

The question I think is what one can read into the words "or may be expected to result", because "has resulted" is a much easier proposition, in terms of gauging a substantial lessening of competition, because you are looking, as it were, at a concrete state of affairs.

MR JOWELL: Yes.

MR JUSTICE MARCUS SMITH: My sense is that it is in the "may be expected to result" that the dynamic competition, if you want to call it, falls. It is not really a natural bedfellow to the case where the situation has resulted, because the potentiality is there.

MR JOWELL: Yes.

MR JUSTICE MARCUS SMITH: So it is those words that I think are of particular concern and importance. Following on from that, you say that the balance of probabilities test applies with equal force to the "may be expected to result" as well as "has resulted".

MR JOWELL: Yes, I have to confess it is not me, it is the Court of Appeal in IBA Health. It is common ground. I can take you to the passage. It is tab 41 of the second authorities bundle at paragraph 46. I think the report itself acknowledges that it has to show on the balance of probabilities. So it is common ground. I can see if one were coming at it afresh, one could interpret that provision differently, but there is binding Court of Appeal authority that it does mean balance of probabilities. More than 50% is what they say.

MR JUSTICE MARCUS SMITH: The trouble with applying that sort of test to a future situation and to a past situation is that one is applying entirely different criteria. I mean, if you look at the "has it resulted", you will look at actual market shares, you will look at what has happened and you will reach a view on the evidence, which may go in multiple directions, but that's fine. Of course, we are very used to that.

MR JOWELL: Yes.

MR JUSTICE MARCUS SMITH: The potentiality is something which is altogether much more difficult. You have adverted to one example already, where you have a small risk of a large effect.

MR JOWELL: Yes.

MR JUSTICE MARCUS SMITH: Now, how does one weigh that in the balance of probabilities? If you say there's a 2% chance that a goldfish or a minnow is going to turn into a whale, but it is only 2%, but it is going to be a very big whale if that 2% eventuates, how does one feed that into the balance of

probabilities? On the balance of probabilities, 2% is tiny.

MR JOWELL: I think the way to look at it is this. Ultimately, where they need to get to for this dynamic competition to work is that you have to take it from the point of view of the incumbent, Meta. Meta has to perceive it is going to become -- that it will be a competitive threat. So you have to be convinced, on the balance of probabilities, that it will become a competitive threat.

Now, it doesn't have to be bound to succeed, likely -- necessarily, in all case, ultimately successful, to become that competitive threat, but it does have to be likely to grow to a sufficient size. When you look at the sort of market share figure, on any view a relevant consideration that you have to take into account is what is the projection that you are making of what this new entrant is going to grow into within a reasonable time-frame.

If, for example, the truth is that the only possibility was that GIPHY might have sold a tiny bit of advertising in the United Kingdom within any reasonable period, then you cannot conclude that Meta would have regarded that as a competitive threat in the UK market.

Our basic point is you have to make some sort of assessment of that. Even if it's a very vague range, you have to make some sort of assessment. What you can't do is just say, as effectively they do is say "We say they would have entered the UK market, but we are not making any assessment at all of the size", because that cannot get you on a balance of probabilities to the position where Meta regards them as a competitive threat.

We say, on the evidence that we supplied them, drawing very conservatively on the US estimates, because after all the US is GIPHY's home market. It has got no presence in the UK so extrapolating those US figures to the UK was a very conservative approach actually. You just don't get anywhere near the sort of

size that you can say that Meta would have been competitively affected. Ultimately, what we say is there's a missing step here. it is just not good enough. Of course, one cannot leave out of the picture that there is this lobbying that is adverted to reduce the balance of probabilities test, to get rid of it. But what you cannot do is just effectively finesse it in this way by the selective use of your guidelines, which is what the CMA do, in our submission.

MR JUSTICE MARCUS SMITH: Hang on. Let me be clear. I don't think any of us here are inclined to create a carte blanche or a blank cheque. Really what I am tilting at is the articulation of a framework, such that the approach of the CMA can be tested and either accepted or rejected, according to the JR standard, on clear rational guidelines. One of the things we are really not very interested in is the creation of carte blanches. So you can take that as -- unless Mr Holmes is very persuasive, you can take that for the moment.

MR JOWELL: In our submission, what we say is what they need to do is to make an assessment of the prospects of success, just as they say, the prospects of successful entry, not just entry, but successful entry, which entails looking at their growth prospects, such that they would become likely to become a competitive threat to the incumbent, so that there would be likely to be some significant reaction. We say that's the proper test that they need to apply.

MR JUSTICE MARCUS SMITH: You are saying, and I quite understand why you are saying it and, with respect, it is right, that however one approaches this question of dynamic competition, it needs to be properly articulated and set out in the decision that so it can be challenged. That's really part of a due process reasoning argument. You are saying it is not. That's fine. Let's park that.

MR JOWELL: Yes.

MR JUSTICE MARCUS SMITH: I am at the moment trying, in an altogether more abstract way, to work out how one controls this somewhat unruly horse of dynamic competition in the statutory test. I think we are already coming close to an acceptance by you, but I will frame it so that you can tell me that you have not accepted it, that the balance of probabilities test is being used in a somewhat unusual way at least, in "may be expected to result". I think you are accepting -- you are not saying it is factually the case here, but I think you are accepting that if there is a 2% chance that a competitor can turn itself from nothing, or tiny or de minimis into dominant, that is something which actually might be enough to satisfy the "may be expected to result" position in section 35 (1) (b).

MR JOWELL: I am not sure whether 2% would do, but if one said, say, 20%, then I would certainly be with you.

MR JUSTICE MARCUS SMITH: Right.

MR JOWELL: That could be, if it could become dominant. My point, and this is the missing step, is you then have to be prepared to posit that there was that chance that it would become dominant, and the notion that GIPHY would become dominant is beyond ridiculous, and not even the CMA suggest that.

So what one can't do is say a less than evens chance of a very, very, on any view, tiny increment is going to competitively affect the incumbent. That you cannot do.

MR JUSTICE MARCUS SMITH: Sure. But the thing is normally when one is applying a balance of probabilities test, if the outcome is massive, if the chances of it occurring are below 51%, it doesn't matter, and that's where --

MR JOWELL: Yes, but I think, just coming back to what I said earlier, I think where the balance of probabilities has to arise, if you are looking at the reaction of

the incumbent as the competitive effect that's being lessened, then you have to show that there is a more than 50% chance that the incumbent will react.

MR JUSTICE MARCUS SMITH: Okay.

MR JOWELL: That's why the guidelines talk about the importance of measuring the effect on the incumbent's profits, because the incumbent makes a calculation. They say: "Well, there's a 40% chance of losing this amount of profit. Therefore I should react now and lower my prices". But there's got to be, on the balance of probabilities, a likely reaction by the incumbent. If there is only the prospect of a reaction by the incumbent, which is really what the report finds, or potential incentives on behalf of the incumbent to respond, which they also refer to, that isn't enough.

MR JUSTICE MARCUS SMITH: That's helpful.

MR SIMON HOLMES: Just to clarify, the balance of probabilities, as I understand it, you are looking at the probability of the incumbent responding. Does that not leave it open as to -- we have been going to these examples of the 2% chance of this and 20% chance of that, that makes it fairly fact-specific, because different incumbents could assess that in different ways.

MR JOWELL: Yes, they could. I accept that.

MR SIMON HOLMES: That's something which the CMA in turn can or should assess, is what you are saying to us?

MR JOWELL: Yes. What you have to do as a prior step is to say: "How important, how big is this new entrant likely to be?" Effectively, you have to make some assessment of that.

MR SIMON HOLMES: Of course you have to make some assessment and that the assessment has to have some basis in fact and rationale.

MR JOWELL: Indeed, it does. Just to finally state on this, there's a lot said in the

skeleton argument about GIPHY being an innovator, but it can't be that it's simply enough to say: "Ah, well, it was an innovator in the US market." For a start, Paid Alignment is not exactly the invention of the steamship. It is a relatively rudimentary invention that is not even protected by any patent, as far as I am aware. The idea that merely because you introduce an innovation of that type in a non-UK market, therefore that means you pass the balance of probabilities for substantial lessening of competition, it just cannot possibly be adequate. Nor can the mere existence of potential incentives on the part of Meta to respond if it did become a particular size. You have to make some assessment of the likely future size. That is what we say on the first ground, unless you have any --

MR JUSTICE MARCUS SMITH: I can see that if there is a subjective assessment on the part of an incumbent that a minnow is going to be a threat in the future, such that it needs to be squished, that would be something that ought to be taken into account when determining whether there is a potential for a substantial lessening of competition, to paraphrase the statute, but does the reverse hold true? Let us suppose, as you say the case is here, the incumbent has no sense of a threat and subjectively is just not bothered at all. All it sees is the minnow.

MR JOWELL: Yes.

MR JUSTICE MARCUS SMITH: But, objectively speaking, the position is that the minnow is going to grow into a shark, it is just that the incumbent has not spotted it, that surely can be enough to generate a conclusion that a substantial lessening in competition may be expected to result.

MR JOWELL: Theoretically, it can be. Any rational regulator will be very careful about making an assumption that a company is going to grow enormously

rapidly, particularly in the circumstances of this case, where nobody else bid for it. What is required, we say, for that unusual process where the incumbent doesn't see the threat, but objectively there is a threat or will be a threat, is you require some assessment of how it's going to grow. You can't say: "The goldfish may become a trout, maybe a modest trout, but it is an innovative trout". That doesn't work. You have to say it is likely to be a shark at least or a whale, or at least that there's a very substantial chance of that happening.

MR JUSTICE MARCUS SMITH: No, I completely take the need for an evidential founding. What you are saying is that oftentimes the incumbent will be aware of --

MR JOWELL: One would expect that to be the usual position. For a regulator to come in and say "Well, we know the market better than the people in the market do", it can be done, but one should be very cautious of it.

MR JUSTICE MARCUS SMITH: One needs a strong underpinning. That I would expect. The extent to which incumbents are aware of threats themselves, we can cite Blockbusters and Kodak and all sorts of people who have been blindsided by developments. Your first point I think is well made. The second point we might debate.

That leads me on to the third area of questioning, which is: is potential market share of the relevant market the only parameter that one needs to get a grip on, in terms of the potentiality of a substantial lessening of competition.

MR JOWELL: I accept it is not the only parameter, but I do say it must be an essential parameter in all cases. One can't just completely duck that central issue, because it is so central to the subsequent question, which is how much of a threat the incumbent is going to see it as being, because it all depends on how much of its future profits it may lose. That is simply the other side of the

coin of the entrant's market share.

MR JUSTICE MARCUS SMITH: The reason I ask is the only reason GIPHY was able to push its Paid Alignment was because it had established a library of GIFs to attract users on social media, WhatsApp, or whatever it might be, to go to their library and search. So you need that side of the market, the eyeballs, as it were, to look through the library that GIPHY have or whichever library there is.

MR JOWELL: Yes.

MR JUSTICE MARCUS SMITH: Only then, with the eyeballs firmly in play, will the Paid Alignment pay off, because if you have no-one looking, then no-one is going to want to pay to be having their particular GIFs put up with no-one looking.

MR JOWELL: Yes.

MR JUSTICE MARCUS SMITH: Does that mean that one ought to have regard to the fact that a certain amount of work had been done by GIPHY in order to create that side of the market, the eyeball side of the market, which constituted the platform for the Paid Alignment to develop?

MR JOWELL: Well, certainly one can see that that would be a sine qua non for saying that they were a potential competitor, because if they were too small, their library was too small, it would be more difficult to develop a Paid Alignment business, or a profitable one. But that can't be enough. That simply gets you off the starting blocks, as it were, with the business.

It is also important to appreciate -- I come back to the point -- that when one talks about GIPHY having eyeballs, more than 95% I think of the GIFs are viewed through others' platforms, of which Meta's platforms were by far the largest. So whether it is really eyeballs on GIPHY's GIFs or eyeballs on Meta's GIFs is

a rather debatable proposition. One of the difficulties that their business had was that they didn't have any or sufficient data to give to advertisers. We are getting into details really that are --

MR JUSTICE MARCUS SMITH: No, but these details may matter. I entirely take your point that we probably need to have a better understanding of how it is that the GIPHY offering nests within the social media in which the GIFs are used, because my point about eyeballs mattering and GIPHY's efforts really does depend in significant part on the extent to which there is a choice, when one is using social media, to look to the GIPHY platform rather than anyone of the rivals that might exist on the market at any given time or in the future. We have got, as you mentioned, Gfycat and Tenor. I had better put this on the table so we know what we are doing. When I use my WhatsApp, I am compelled -- it may be there is an option on my phone to change it -- but I am compelled to use the GIPHY library of GIFs, but oddly enough, when other people are using WhatsApp on their device, they seem to get a choice between, in that example, Tenor and GIPHY.

Now, that choice may well matter if one has the ability to say "I would like to select my GIFs from (a) only, (a) and (b), or (a), (b) and (c)", then suddenly the work that is done by (a) or (b) or (c) actually matters. If, on the other hand, Meta, or whoever is providing the social media platform is incorporating one of multiple libraries without a choice, then the point has significantly less force.

I certainly don't want any response on this technical question now, but it does seem to me that it matters in terms of assessing what it is that GIPHY is bringing in terms of its established position in the market.

MR JOWELL: Yes. On the technical question, I have been told WhatsApp actually has both Tenor and GIPHY integration, but it depends on the user and what is

the operating system that is used. So it may depend.

MR JUSTICE MARCUS SMITH: It may depend. It may matter, because you are focusing, and I quite understand why you are, on the development of the advertising position in the market, and you are saying (a) nothing in the UK, and (b), very little in the US.

MR JOWELL: Yes.

MR JUSTICE MARCUS SMITH: What I am really putting to you for your comment is if and to the extent that there's a level of work which has been done by GIPHY which has not yet generated the advertising profile, because you need to get the library and the buy-in of the eyeballs into this library as being something they care about, it is that that leads to the monetisation of the advertising, because we are talking about your usual two-sided market. To go back to old technology, if I am talking about a free newspaper that I am picking up at the station, if everyone on the 6.45 to Cambridge is picking up the Evening Standard, then the advertising is more valuable than if no-one is picking it up and they are going past and picking up the free Metro newspaper instead. So that work matters.

Really, where I am getting to is to what extent has GIPHY done a great deal of work in establishing those precursor steps to implant itself in the advertising market?

MR JOWELL: In some senses, the very tiny revenue figures that you see in the first confidential passage in a way gives you the answer, that they have not got very far. We will not be able to reach agreement on this, because of the profound disagreements over the true prospects of GIPHY's advertising service. What is I think common ground is certainly it faces a number of fundamental challenges, which arise not least from the fact that its access to

end-users is mediated via other apps that have control over access to the end-users. So it does not have access to the data that the advertisers so critically need. There are many other issues with its ability to launch advertising products, some of which are adverted to in the decision. We don't say necessarily that our view is the better one as to its prospects. Fundamentally, what we say is the CMA had to form a view on its prospects and the extent of its prospects before it could make the finding of a likelihood of a substantial lessening of competition in the form of some reaction from the incumbent, or even if they would prefer from the presence of that company itself on the market. Either way, it is not enough to say: "Oh, it is an innovator". You have to look at some estimate of market size. Otherwise the doors are open to anyone effectively to say: "Well, we can prohibit, unwind the foreign merger between two entirely foreign companies, provided only we can say the purchase has got significant market power and the purchase company is an innovator in some foreign market". And that simply can't be a proper application of the statute as it stands.

MR JUSTICE MARCUS SMITH: Yes. I mean, if I can summarise your position, the debates we have been having on the more abstract points, the minnows and all that --

MR JOWELL: Yes.

MR JUSTICE MARCUS SMITH: -- you say is really in the realm of the academic, because if you had got from the decision an articulated process along those lines, then you would attack it in a different way.

MR JOWELL: That's right. That's right.

MR JUSTICE MARCUS SMITH: As it is, you have got what you are saying, and I am sure Mr Holmes will label it differently, but you are saying you have just

got the carte blanche approach where there is mere assertion without any beef.

MR JOWELL: Yes, that's right.

MR JUSTICE MARCUS SMITH: It is the absence of beef that is the problem.

MR JOWELL: Yes. Effectively, supposing they had said in the decision: "We assess they are going to do three times as well in the United Kingdom as they are in the United States, and that will get them to 1% in the UK market within five years", we would be saying (a), that is taking leave of your senses to think they are going to do that, and (b) 1% itself is not enough.

As it is, they simply duck the issue. They say: "That's all very messy. We are not going to do it". It may be messy, but you have to make a projection under the statute. That's effectively what we say.

If I may quickly try to deal with ground 2, the report defines various markets for digital advertising. You will see those in the report at page 608, which I think I should just invite you to take up. The ones that matter are search advertising and display advertising. Search advertising is defined as:

"Where advertisers pay online companies to link their company website to a specific search ..."

MR SIMON HOLMES: Which paragraph?

MR JOWELL: Paragraph 156 on page 608:

"Advertisers pay online companies to link their company website to a specific search word or phrase so that it appears in relevant search engine results."

I am sure we are all familiar with putting in a search into Google and along with your various general search results you will get some advertisements.

In response to the Tribunal's request in the letter of Friday, we have got some visual aids, which I think you should have in front of you. I think the CMA have done

their own, which they may take you to in due course. In search advertising, the third sheet, you see the user enters the search term and then you see the result. If you say "Let's type in doughnuts" and you see the results, which include a Wikipedia definition of doughnuts but also various advertisements for doughnuts.

Then one has display advertising. That's something very different, where advertisers pay online companies to display advertising using a range of advertising content types shown within defined ad units on web pages or mobile apps. We have given some examples of effectively ads that appear in a block when you are looking at a particular website. I think the CMA has an example of The Guardian newspaper where you see again just adverts appearing in a block.

MR JUSTICE MARCUS SMITH: That is really in each case matching content, but it is a different way. So in the search advertising, as it were, it is the search term that triggers the paid search responses that are laid as ads in Google, whereas in display advertising you are looking at something for some other reason. You are reading your Guardian article or looking at something else, and there's space on the screen where related or content that might be thought to be of interest to that particular reader comes up in the form of advertising.

MR JOWELL: That's exactly right. The point to observe for present purposes, effectively, the division of the digital advertising market in this way is based entirely on the operational or functional characteristics of the advertising concerned. So it is the superficial form of the advertising. It is not based on its purpose. It is just its superficial form.

There is underlying that division, based on superficial form, is a belief on the part of

the CMA, that one also sees that it has carried over from its report into digital advertising, that search advertising is correlated with an immediate intent to purchase, whereas display advertising is correlated with trying to raise brand awareness.

In other words, if you are trying to sell something to somebody who is about to buy, in the market to buy, then you use search advertising, but if you are just trying to build brand awareness then you use display advertising.

The actual definition isn't based on that underlying difference. It is just based on the superficial form.

MR JUSTICE MARCUS SMITH: Yes.

MR JOWELL: The second point to observe is that Meta strongly contested this division and contended that there's a single advertising market, certainly a single digital advertising market. You will see that, if I could just show you that -- it is recorded on page 609 at paragraph 5.159.

"As noted above, the party submitted that the CMA is required to carry out a robust market definition exercise, based on empirical evidence, in circumstances where its conclusion of market power is based solely or primarily on the level of market share, and that CMA has failed to undertake a proper market definition exercise based on economic substitutability. The parties submitted that Facebook strongly disagrees with the conclusion of the market study, which considered display advertising to be distinct from other forms of advertising. It considers all forms of advertising to be substitutable. They characterised the CMA's approach to delineating between different types of advertising, as based on arbitrary functional characteristics and hinging on an unsupported assumption that search advertising is relevant for targeting consumers with an intent to purchase, whilst display advertising is about

brand awareness. The parties argue that advertisers allocate their budgets across all different advertising channels with a goal to maximise their return on investments and that the characteristics and purpose of search and display have significantly converged over the past years."

So those are the arguments that the parties made.

The third point I would just observe is that this way of dividing the digital advertising market between search and display is the basis on which the CMA arrived at its conclusion that Facebook, as it then was, had market power. One sees that finding of market power then becomes an essential building block in the conclusion that there's a horizontal SLC.

So that's the background. One then comes to Paid Alignment. You will see some examples on the slide or the printed out slide of Paid Alignment. As you see, the customer might put in a search term again, as with search advertising, searching, but this time searching for a GIF with doughnut, say, to give the example, and the result will be a featured sponsored GIF ad, say, for example, from a doughnut selling company.

Now, Paid Alignment you can see from this, is plainly not display advertising, as defined by the CMA. By no stretch of the imagination does it constitute advertising in which payment is made to show adverts within defined ad units on web pages or mobile applications.

It is superficially much closer to search based advertising, because the sponsored GIF appears in response to a search term. This, of course, presents a bit of a conundrum for the Authority, because if the CMA sticks with its functional operational definition of display advertising, then it would have to acknowledge that Paid Alignment doesn't compete in the same advertising market as Meta. That poses a serious difficulty for the horizontal SLC,

because how can you say that the elimination of this tiny potential advertising competitor would be expected to lead to a substantial lessening of competition on the relevant market if it doesn't even compete in the relevant market on which the incumbent competes?

On the other hand, if GIPHY's Paid Alignment does compete in the same market as Meta, then you obviously have to change the definition of the relevant market. One possibility is you say: "Well, all right, we agree with you. There is actually a single digital advertising market". Another possibility is they might say: "Well, no, we can no longer look at the functional superficial form. We do have to look at the underlying, and then we have to subdivide the market in a more profound way". But however you cut it, it would have necessitated a re-evaluation of the relevant market, because you are putting something into the relevant market which is not on your current definition within it, because it is just simply not display advertising as defined.

Instead of doing one of these two things, however, the report seeks to finesse the position. What it decides to do is to profess agnosticism, and say: "Well, we are not going to reach a view on whether GIPHY competes in the same market as Meta. We are not going to do that. But instead at the same time we are going to make a series of very clear and very trenchant findings, according to which we are going to say that GIPHY's Paid Alignment Advertising constitutes what it calls a close substitute and a close competitor to Meta's advertising".

We say: "Well, I am afraid you can't just duck the issue in this way. They were obliged to come off the fence."

Let me show you those findings where they say that it's a close competitor.

If you look in the report at page 765. This is 7.254 (c) (i). They say:

"GIPHY's Paid Alignment would have been a close competitor to Facebook ..."

It goes on: "A close competitor".

"And it would have become an important alternative to Facebook for at least some advertisers' display advertising budgets."

In C2 you say we say at the end:

"The evidence supports the view that GIPHY was an important player in a potentially growing segment of the display advertising market."

So, with respect, the professed agnosticism as to the relevant market in which this would compete is just bogus. We find in terms findings that it's a close competitor, a close substitute, and competing in a segment of the display advertising market.

We say that, therefore, if the report is tacitly making that finding, then you have to adjust your market definition. Had the CMA reconsidered that market definition, it would have had wider implications, or at least it might have done. It can't be said that it was in any way inevitable that a reconsideration would have left intact the findings of Meta's market power.

We refer in this regard to a good deal of evidence in the public domain that shows that there are other types of search advertising that at least arguably could be used for brand promotion.

The CMA's answer to this is really they refer to their merger guidance again, and they say: "Well, we don't need to have a precise definition of the relevant markets. We live in effectively a post-modern competition law world, where we no longer have the nuisance of defining a relevant market".

The problem with that I am afraid is two-fold. First, the statute requires you to define a relevant market, because you have to find a substantial lessening of competition within it.

Secondly, they do define a relevant market. They define the display advertising market, and it uses that market definition to hang around Meta's neck a finding of significant market power.

Having done that, you can't then, when you come to the same market, say that somehow everything is all loosey goosey. You have to apply it with the same vigour, with consistency, or you have to change it. So those are our submissions on 2A.

If I may skip over 2B and come back after lunch to the counterfactual, which will take me a little time to go through.

MR JUSTICE MARCUS SMITH: Thank you, Mr Jowell. I am conscious that you will have allocated time without reference to unpredictable, dynamic interventions from the Tribunal. Would it assist if we started at 1.45.

MR JOWELL: Very greatly assist.

MR JUSTICE MARCUS SMITH: We will do that in that case. I don't want either of you -- it is you bearing the brunt, Mr Jowell -- either of you to feel that our interventions are eating unduly into your time.

MR JOWELL: Not at all. They are very helpful.

MR JUSTICE MARCUS SMITH: They may or may not be. We find it important to get it off our chest just so we can be told how wrong we are or how we have misunderstood things, but we really don't want to cause either of you to cut your cloth excessively short. So we will start again at 1.45 in that case.

MR JOWELL: Thank you very much.

(1.00 pm)

(Lunch break)

(1.45 pm)

MR JOWELL: I come next, if I may, Mr Chairman, to the third ground, which relates

to the appropriate counterfactual. The counterfactual is identified in the report at 6.169. If I could invite you to look at it, it is on page 675, paragraph 6.169. I would observe a few points about it.

First of all, it posits that GIPHY would have continued not just to supply GIFs, but also to innovate, develop its products and services, generate revenue and explore, with the financial and commercial support of investors, various options to further monetise its products.

In short, on the counterfactual, GIPHY would have not only continued to survive, but it would also have continued to develop and expand, particularly in the sphere of revenue and monetisation. That's important, because it is the critical premise for the next step in the CMA's analysis, which posits that GIPHY would have been likely to expand in the near future internationally, and indeed into the United Kingdom. We see that, for your note, at paragraph 7.145 of the report.

Now, if the true counterfactual is that GIPHY would have survived and continued to supply GIFs but its revenue and monetisation would either have stalled or been cut back, then there would be no proper basis for positing the likelihood of international expansion or therefore the horizontal SLC more generally.

The other point we observe about the way the counterfactual is formulated is that it is posed on at least two alternative bases. It is said to prevail regardless of GIPHY's ownership. We see there are two possible forms of counterfactual ownership. The one is the existing ownership structure, so receiving more financial support from the existing investors, and the other is the possibility of a sale to an alternative purchaser, possibly another social media platform.

The report declines to choose between the two, doesn't say which one is more probable. To be clear, we don't dispute their entitlement to do that, at least at

a theoretical level. If the report finds two different possible permutations have substantially the same likely outcome, then we accept that they don't necessarily need to choose between them and say which one is more likely, but if, on the other hand, one of the two possible permutations lead to a different outcome, then we do say that then it becomes necessary to make a choice. If one of the two does not support the posited counterfactual, then they do have to make a choice.

I mean, if, for example, to give a basic example, if the counterfactual is that you would have reached Rome by road and all roads lead to Rome, then we accept it is not necessary to stipulate which specific road would probably have been taken, but if on the other hand one of the roads that you posited leads to Naples or leads to the middle of nowhere, then you do have to assess which of the various posited roads was the more probable road.

The problem for the CMA in the present case is that when one looks at the two permutations that they posit, whether it be a sale to an alternative purchaser or the existing investors continuing to invest, we say that actually when you look at the evidence, neither of those permutations is rationally supportable. That is even granting them a wide margin of appreciation.

We do say that in order to succeed on the point we should not actually have to show that neither of the possibilities lead to a counterfactual. It should actually be sufficient to show that either of them does not lead to the counterfactual, but, as I say, we do actually say that in this case neither road leads to Rome.

I should before I deal with these two main possibilities that one sees identified, the existing investors and sale to alternative purchaser, I should just briefly deal with two other possibilities that are vaguely floated in the report. One of these is the possibility of GIPHY charging a platform fee to obtain funds and the

other is the existence of an external investor.

It seems to me that it is common ground, and I will be corrected if I am wrong, that the platform fee is not posited actually as a true alternative. It is at best a survival strategy. You will see that if you go in the report to page 645, please, at paragraph 6.62. They say:

"As explained, the platform fee option represented a potential short-term solution to ensure its continued survival during the Coronavirus pandemic. The introduction of a platform fee was not likely a long-term strategy of GIPHY."

So that can't be the basis for a counterfactual in which there is expansion. The counterfactual must be based on other sources of funding.

Now, when it comes to external investors, the report only identifies two potential external investors. One of them I believe whose name remains confidential is clear that it would not have been interested in acquiring a significant percentage of GIPHY and would at best have been interested in a modest minority investment. You will see that at 6.119, which is on page 659. Forgive me. The name is not confidential. It is ByteDance. You see there:

"When the investment opportunity was presented to ByteDance by GIPHY, ByteDance had no intention of acquiring a significant percentage of GIPHY, and noted that it only entertained a modest minority investment."

The other, which is Playtika, one sees that they didn't perform any due diligence. You see in 6.116, on the previous page, the conclusion:

"Given that Playtika did not perform any due diligence, it is not clear whether Playtika would have ultimately proceeded with an investment."

So the mere possibility of something occurring can't be sufficient to support a robust counterfactual.

So what we are left with are the existing investors and a new investor. Certainly we

say that the external investor is not floated as more than a mere possibility.

So if could I start then with the possibility of an alternative purchaser, we find that CMA's approach here is very difficult, with great respect, to understand how they arrive at the conclusion that there was an alternative purchaser.

The starting point is that JP Morgan made considerable efforts to approach a number of different potential purchasers. One sees that at 6.129 to 6.130. In 6.130 you see the names mentioned.

It started its efforts in November 2019 without -- you see there it is recorded that it had a number of meetings in November and December 2019. Now at this point I am afraid I am going to have to request that we go into private so that I can start to discuss the information with more liberty.

MR JUSTICE MARCUS SMITH: Of course. Logistically how is that best to be done. We can switch off the live stream I think. Let's do that now. Then anybody who is not within the relevant confidentiality ring I am afraid you will have to leave. We will invite you back in at the appropriate moment. I should say before you do leave, this was the subject matter of an argument last week before me, in terms of how we would deal with matters, and there will be a ruling which I have made but not published, for reasons that were obvious, there will be a ruling published justifying this course at the end of the day, so those who are being excluded at least know why that is happening. But I am afraid anyone who is not in the ring for the reasons that I will be handing down at the end of today should leave the room now.

(COURT IN PRIVATE SESSION)

(COURT RETURNED TO OPEN SESSION)

Submissions by RESPONDENT

MR JUSTICE MARCUS SMITH: Mr Holmes.

MR HOLMES: Good afternoon, sir. I will be addressing you on the first three grounds of Meta's application for judicial review. Mr Jones will present the CMA's case on grounds 4 to 6. I should just say at the outset that regrettably I have another engagement as a result of a listing at short notice in Luxembourg and as a result with the Tribunal's leave I will therefore depart at the conclusion of tomorrow's business. I mean no disrespect to the Tribunal.

As the Tribunal has heard from Mr Jowell, the first three grounds are primarily directed at the horizontal SLC finding. The only exception, as was briefly canvassed this morning, is ground 2B, which concerned the CMA's assessment of GIPHY's market position in the supply of searchable GIF libraries, and that is relevant to the CMA's vertical SLC finding, which is based on input foreclosure and the CMA's findings as to the existence of a vertical SLC are otherwise unchallenged.

The complaints made under grounds 1 and 3 are addressed to the substance of the CMA's analysis. It is said that the particular conclusions arrived at by the CMA are irrational or that they disregard relevant considerations or that they're based on a lack of reasonable enquiries or that they are not adequately supported by the evidence. The approach to be taken to challenges of this kind on a judicial review is well-established.

We have summarised the key principles in paragraphs 7 to 12 of the defence. They are also conveniently set out in a couple of recent Tribunal judgments on applications to review merger decisions.

The firth of those is the Sabre Corporation case, which might be worth opening up. It is in authorities bundle 5 at tab 100. The relevant discussion begins on page 3671, using the rolling numbering. I can take this quickly, because I know that you will be familiar with these materials. First point, well-established following the Court of Appeal's judgment in IBA, that notwithstanding the Tribunal's expert composition, the review is not to take the form of an appeal on the merits, but is limited to ordinary principles of judicial review.

The second point at paragraph 58, which is taken from the judgment of a Tribunal panel chaired by Mr Justice Sales, as he then was, is set out at the top of page 3762. As stated in the quotation:

"The CC must take reasonable steps to acquaint itself with the relevant information to enable it to answer each statutory question posed for it, but the extent to which it is necessary", slipping down to the middle of the paragraph, "to carry out investigations to achieve this objective will require evaluative assessments to be made by the decision maker, as to which it has a wide margin of appreciation, as it does in relation to other assessments to be made by it. In the present context, the Tribunal therefore accepted the CC's primary submission that the standard to be applied in judging the steps taken by the decision maker in carrying forward its investigations to put itself into a position properly to decide the statutory questions is a rationality test."

What Mr Justice Sales means by the rationality test is explained in the inset quotation. We saw the formulation also the Law Society judgment this morning.

"The court should not intervene merely because it considers that further enquiries would have been desirable or sensible. It should intervene only if no

reasonable public authority could have been satisfied on the basis of the enquiries made."

Turning briefly on to page 3674, the same point emerges from the Court of Appeal authority cited in paragraph 61 on the duty to make reasonable enquiries. You see that in particular from the underlined text in the middle of the paragraph:

"The court should intervene only if no reasonable authority could have been satisfied on the basis of the enquiries made that it possessed the information necessary for its decision."

Returning to page 3672, the third point is captured in the final paragraph of the BAA quotation above paragraph 59:

"As set out there, it is a rationality test which is properly to be applied in judging whether the decision maker had a sufficient basis, in light of the totality of the evidence available to it, for making the assessment and in reaching the decisions it did. There must be evidence of some probative value on the basis of which the decision maker could rationally reach the conclusion it did."

That we say is the test to be applied to Meta's allegations that certain of the CMA's conclusions were not sustained by the evidence before it.

The fourth and final point is at paragraph 60, and is made by reference to the Tribunal's judgment in the Stagecoach case, where the Panel was chaired by Ms Vivien Rose, as she then was. That statement stated that:

"On a rationality challenge the hurdle which the applicant had to overcome was a high one."

In the quotation that follows you see that it is explained that:

"Where the applicant asserts that there is no or no sufficient evidence to support one of the Commission's key findings, the applicant must show either that there is

simply no evidence at all to support the Commission's conclusions or that, on the basis of the evidence, the Commission could not reasonably have come to the conclusions that it did. The fact that the evidence might have supported alternative conclusions, whether or not more favourable to the applicant, is not determinative of unreasonableness in respect of the conclusion actually reached by the Commission. We must be wary of a challenge which is in reality an attempt to pursue a challenge to the merits of the decision under the guise of a judicial review. It is important to consider the evidence relied on and the decision taken as a whole and the decision should not be analysed as if it were a statute. The Tribunal must consider the materiality of any fact found by the Commission which the Tribunal determines has no evidential foundation. Not every failure in fact finding and analysis by a decision-making body requires or permits its finding or decision to be quashed."

While we are in this bundle it may be worth turning back a few tabs to the judgment at tab 91 to pick up a couple more points. Another merger review case, the Ecolab case, again from 2020.

Picking it up at page 3313, you see the heading "Rationality". It recites the passage we have already seen from the BAA case.

Over the page, there are two additional points that are just worth noting.

The first is the point made at the top of the page in the BAA judgment.

"Even in a case which involves divestment and which, therefore, engages protocol 1 of the European Convention on Human Rights, the test is still manifestly without reasonable foundation."

You see that at the end of the inset quotation. So effectively the same standard.

The second point, in the middle quotation, picking it up halfway through:

"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 or experienced decision maker such as [in that case] the CC."

In my submission, that is relevant to all three of Meta's substantive grounds of review which challenge assessments that are partly predictive of how matters would have evolved absent the merger.

We say that, when considered against the judicial review standard, Meta's grounds don't show any error in the CMA's assessment.

On the contrary, the CMA, as I hope to show you, conducted a careful and extensive investigation. Its reasons for finding a horizontal SLC are coherent and adequately supported. Meta has not provided a good reason to quash them.

With that brief introduction, by reference to the case law, if I could turn to Meta's grounds beginning with ground 1.

This ground challenges the SLC finding on the basis that the CMA should have but did not assess the extent of the market share and revenues that GIPHY would achieve post-entry or the co-relative loss in Meta's profits which would follow. That's how it is put in the skeleton. It is said that the CMA has thereby failed to show that any lessening of competition would be substantial.

In order to assess this we will need to go into the decision and I will need to show you passages that did not feature in my learned friend's submissions this morning which we say are important in understanding the overall conclusion. Just briefly to show the conclusion. It is at page 858 of the decision in volume 2. You see there:

"The conclusion that the creation of this relevant merger situation has resulted ..."

MR SIMON HOLMES: Which paragraph are you at?

MR HOLMES: Paragraph 10.2 on page 858. It is showing you the horizontal SLC

conclusion. Do you have that? You see there:

"The conclusion that the creation of the relevant merger situation has resulted or may be expected to result in a substantial lessening of competition."

Then you see from (a), that "the relevant market is the supply of display advertising in the UK and the horizontal effects that are alleged to result arise from a loss of dynamic competition".

The CMA's approach to dynamic competition is explained in the recent merger assessment guidelines which Mr Jowell took you to. We will return to the decision, but I do just need to pick up a couple of points on the guidelines. They are in authorities bundle 6, tab 106, beginning at page 4076. I should say immediately we, of course, accept the point you made, sir, that the guidelines can't displace or amend the obligations that arise under the statute, but they are informative, in my submission, in explaining the approach that the CMA took in the decision and it is for that reason that I take you to them.

Paragraph 5.1, beginning on page 4117, chapter 5. You see that this chapter is headed "Potential and dynamic competition". This is really where you find the CMA's understanding of the concept. At paragraph 5.1 it begins with a reference to unilateral effects and it notes that:

"Such effects may arise from the elimination of potential or dynamic competition."

It then explains that:

"Potential competition is used to refer to competitive interactions involving at least one firm that has the potential to enter or expand in competition with other firms."

In 5.2 and 5.3 the guidelines then identified two separate ways in which mergers involving a potential entrant can lessen competition. The first, at paragraph 5.2 is that:

"A merger involving a potential entrant may imply a loss of the future competition between the merger firms after the potential entrant would have entered or expanded."

So here the effect is that the potential entrant will not as a result of the merger sell their own goods or services in competition with established suppliers on an independent basis. It is that loss of competition following entry which this explains.

Then a second and distinct additional competition concern is then identified in 5.3. As that explains:

"Existing firms and potential competitors can interact in an ongoing dynamic competitive process and a merger can lead to a loss of dynamic competition."

If I could just ask the Tribunal to read the remainder of that paragraph, please. (Pause.)

PROFESSOR CUBBIN: Could I ask you if this means there are two finds of competitors, ordinary competitors and dynamic competitors?

MR HOLMES: I don't think so, sir. I mean, you are the economist and not me. So I defer to your view, but I think what's being suggested is that a competitor, once they enter, can, of course, be involved in competition in the sense of selling and buying goods in the market with benefits in terms of price from their presence and the competition that they bring to bear. But there's also the competition that arises from firms both once they have entered through their efforts to enter. That's part of a sort of dynamic competitive process.

I suppose, in answer to your question, a firm that has entered post-entry could be involved in both types of competition. But as I read the guidelines, the CMA's view is that before entry a potential entrant is already involved in a competitive process in trying to bring a new product to the market, or can be involved in

the process of dynamic competition if they are trying to launch something which is innovative and will be of benefit to consumers. Does that answer your question?

PROFESSOR CUBBIN: I am trying to understand what the CMA's understanding is and whether the CMA is making the assumption that most competitors don't involve dynamic competition or are unlikely to involve dynamic competition and only can identify a particular sector or set of firms where you can give a slightly different treatment perhaps, because these are actually dynamic competitors as opposed to ordinary, undynamic competitors. I am seeking clarification.

MR HOLMES: Of course. I shall take instruction on that. I think the point that's being made here is that even before a firm actually enters and starts selling in the market, it might be involved in a process of dynamic competition, by reason of its efforts to enter with new products that push the state of progress in the market forward.

PROFESSOR CUBBIN: Okay. Thank you.

MR HOLMES: Two points on paragraph 5.3. First of all, dynamic competition is clearly articulated as a separate and distinct concern from the loss of future competition as a result of the potential entrant actually starting or increasing supply of a product or service, and, secondly, such dynamic competition may operate before a potential entrant ever launches a product or service or does so at scale.

The mere fact of its efforts to enter constitutes a contribution to the competitive process, and that contribution may in turn stoke efforts on the part of those already in the market.

It follows, if that's right, that a merger which puts paid to a potential entrant's efforts

at independent entry may end the process of dynamic competition which is already eventuating, and which would, in the absence of the merger, have continued, whether or not the potential entrant ever in fact succeeded in bringing a product to the market.

You see that from the reference to potential entrants even before they effectively enter and begin supplying customers. The merger might reduce their incentives to continue with efforts to enter or expand or the incentive of incumbent firms to mitigate the threat of future rival entry or expansion with their own efforts.

Paragraph 5.4 then identifies particular market features which may make losses of dynamic competition more relevant, and this perhaps goes to the question that Professor Cubbin raised, that there are some market contexts where this dynamic competition may be particularly important. It explains that they may arise in particular when the investments involved in entering or expanding represent an important part of the competitive process in industries where the process of entering markets takes place over a long period of time and involves significant costs or risks, or where key aspects of the competitive offering, during the investment stage, rather than flexed on an ongoing basis.

Then examples are given, the first of which is of digital platforms where the cost and time required to build up a significant user base and achieve network efficiencies might involve years of losses with ongoing uncertainty about whether the platform would eventually be successful.

You, sir, raised the question of whether GIPHY's user base was a relevant aspect of the CMA's competition assessment in this case. As we will see, it is indeed, and that ties in I think with the point that is being made in this paragraph of the guidance. The risk of losing dynamic competition would be particularly

pronounced, the guidelines suggest, in markets of this kind, so that if entry generally requires intensive innovation and sustained effort, that process will be particularly important to protect so as to maintain both the dynamic competition from the potential entrants and the responsive efforts that that can be expected to generate from the incumbents.

The guidelines then proceed to discuss these two different ways in which a merger involving a potential entrant might lessen competition, that's to say future competition and dynamic competition.

Starting with future competition, in paragraph 5.7, the focus, as one would expect, is on the prospects of entry or expansion in fact eventuating.

Thus, at paragraph 5.7, the CMA explains that in assessing whether a merger involving a potential entrant leads to a loss of future competition between the merger firms, the CMA will consider evidence on whether either merger firm would have entered or expanded absent the merger, and whether the loss of future competition brought about by the merger would give rise to an SLC, taking into account other constraints and potential entrants. So focus on entry and expansion.

The discussion on dynamic competition begins a couple of pages on, at page 4120, under the heading "Loss of dynamic competition". There are a number of points to note here.

The first, at paragraph 5.17, is that the guidelines identify the dynamic competition represented by the potential entrant's efforts to come into the market. So, as explained there:

"In some sectors an important aspect of how firms complete involves efforts or investments aimed at protecting or expanding their profits in the future. This includes efforts that may give firms the ability to compete in entirely new

areas, i.e. to enter, or the ability to compete more effectively in areas where they are already active, that's to say to expand."

So this is the dynamic competitor, the potential competitor, who is seeking to innovate as a means of entry.

The second point, at 5.18, identifies another way in which dynamic competition can play out. Specifically, you see that this identifies the scope for responsive interactions to which such entry efforts can give rise as incumbents seek to protect their position. So you see there the reference to:

"Dynamic competitive interactions between existing competitors and potential entrants that are making efforts to enter and expand. Existing firms may invest in the present in order to protect future sales from dynamic competitors."

So another potential feature of dynamic competition, a response to the efforts of the entrant to come in.

Thirdly, at paragraph 5.19, the guidelines explain that the mergers can reduce this dynamic competition in one or both of two ways, which are set out at the top of 1421.

"On the one hand, (a), a merger may lead the existing supplier, the incumbent, to reduce its efforts to protect against the possible impact of the dynamic competitor, one potential adverse effect. On the other, at (b) a merger may lead the merged entity to reduce those efforts by suppressing the independent incentive to enter on the part of that dynamic competitor."

So it follows that dynamic competition concerns can arise in circumstances where the incumbent has not yet recognised or responded to the competitive threat represented by the potential entrant. There may still be harm to dynamic competition as a result of the potential entrant itself ceasing its efforts,

removing a present source of dynamic competition, and there may also be harm to dynamic competition as a result of the response that the incumbent could have been expected to make subsequently if the potential entrant's efforts had not been ended by the merger, even if that response had yet to eventuate by the time of the merger.

The fourth point appears at paragraph 5.20. This recognises that:

"There may be some uncertainty about the outcome of investments and innovation efforts absent the merger, including whether the investments being made by merger firms would ultimately result in products or services being made available to customers. However, uncertainty about the outcome of a dynamic competitive process does not preclude the CMA from assessing the impact of the merger on that dynamic process. A process of dynamic competition can increase the likelihood of new innovations or products being made available and therefore has economic value in the present."

So a loss of dynamic competition may arise from a merger whether or not the potential entrant would ultimately have succeeded in entering. That may be a present loss of competition or one that would arise from a competitive response even prior to entry.

A detailed consideration of the degree of likelihood of successful entry is obviously of relevance to future competition, the first of these ways in which a potential competitor merger might have an effect on competition, but if the concern is about a loss of dynamic competition, there may be such a loss even if the potential entrant's prospects of entry are speculative and uncertain. The competition that is being harmed is already present in the market as a result of the potential entrant's efforts to develop its new offer.

The fifth point is in paragraph 5.22. It concerns the evidence that may be relevant in

assessing whether a problem arises by reason of the suppression of responsive efforts on the part of the incumbent. The paragraph notes that:

"When assessing losses of dynamic competition, the CMA may consider evidence on any direct response of an incumbent merger firm to the threat of entry or expansion by the other merger firm, or may consider evidence on the incumbent's incentive to respond to any such threat."

So, on the approach set out in the guidelines, evidence of responsive action or internal documents showing an awareness that the potential competitor poses a threat would obviously be relevant, but there may be other ways in which that dynamic competition is harmed. For example, the CMA may consider evidence on the incumbent's incentive to respond to such a threat.

That makes sense, bearing in mind that by the time of the merger the dynamic competition in the market may be confined to the potential entrant's efforts to enter, but a consideration of the incumbent's incentives may indicate that the incumbent could have been expected to respond subsequently in the absence of a merger.

The fifth and final point at paragraph 5.23, to which Mr Jowell took you. You see that paragraph identifies a need to assess the prospects of successful entry and the expected closeness of competition between the dynamic competitor and the other firms.

As we will see when we come to the decision, the CMA did assess both of those matters in the decision, and I will show you the relevant elements of the CMA's reasoning.

So that's how the CMA's guidance addresses the concept of dynamic competition, with the aim of showing that the concept is not a novel or unorthodox one. It is established as a feature of merger control in the UK and in other

jurisdictions. We also give references to recent academic literature about it. I don't propose to take you to them, but they are set out in paragraph 16 of our skeleton argument and the accompanying footnotes. Those we say provide an answer to the suggestion by Mr Jowell that this is a novel and unorthodox feature of UK merger control.

Returning then to the decision, the reasoning which underpins the CMA's conclusions on the horizontal SLC are set out in Section 7 in bundle 2, tab 19, starting at page 676.

Paragraph 7.1 frames the discussion, explaining that:

"The CMA is assessing whether the merger has or may be expected to lead to a loss of potential competition in display advertising in the UK."

That reference to potential competition is, of course, to competition from a potential competitor drawing on the framework we have just seen in the merger guidelines.

Looking down the page at 7.4, we see that the CMA is specifically concerned with the second of the two types of competition from a potential competitor, not future competition, but dynamic competition.

Paragraph 7.2 identifies GIPHY's contribution to dynamic competition which lay at the root of the CMA's concern. The paragraph starts by noting that:

"GIPHY is a leading provider of video GIFs and GIF stickers accounting for the majority of the GIF searches globally, and that GIFs are popular amongst social media users and an important engagement tool for social media and other platforms."

It is perhaps worth recalling at this point the scale of GIPHY's activities, as they are relevant to the competition assessment. If you can turn back -- we will come back to 7.2, but if we could glance back at page 502. You see at 2.4 that

GIPHY has over 800 million users globally, counted both owned and operated O&O channels and distribution partners.

You can see in the green text, in 2.4, the average monthly searches that are generated through its third party distribution channels worldwide, using GIPHY's platform.

Looking down at the green text in paragraph 2.5, you see the number of monthly searches delivered by GIPHY in the UK alone across its entire distribution network.

Over the page at 2.6 you see that GIPHY identified over 10 million UK IP addresses that were served with its content during the course of a single week in March 2021.

Turning on to page 548, you see GIPHY's comparative success in serving GIFs to users. Figure 9, in the centre of the page, sets out a comparison of the global monthly searches of GIFs by GIPHY, Tenor, which is owned by Google, and Gfycat. The green line is the combined total. The dark blue line is the GIPHY total. So a formidable scale of activity in the supply of GIF content, and a very significant established user base.

As you put it before the short adjournment, sir, GIPHY had the eyeballs in very large numbers. The strength of GIPHY's business position is attributable to their success in a number of aspects of the activity of providing searchable GIF libraries to users.

To make that good, going back to page 534, you see that there are a number of activities involved in GIF supply, which are then set out over the page at 535.

MR SIMON HOLMES: Could you please give us the paragraph reference?

MR HOLMES: Page 534 at paragraph 10. You see there that there are various activities identified which are involved in the process of GIF supply. They

include sourcing, moderating and hosting a library, search algorithms and distribution. Those are expanded upon in the following paragraphs.

You see at paragraph 4.18 the idea that high quality, professional content is perceived as important is also supported by GIPHY's internal documents. So one feature of what makes a successful GIF provider on the market GIPHY competes on is high quality, professional content. You see in the text how GIPHY describes its selling points.

You see at 4.20, licensing rights to content. You see that GIPHY has created a purpose built licensing agreement enabling it to secure legal permission from the owner of the intellectual property for that content.

At 4.25 you see that well-moderated content is important to social media platforms, as offensive content can degrade the user experience.

In the final sentence on that page you see a statement about Facebook's assessment of the GIF provider landscape.

Chapter 5 assesses GIPHY by reference to these various attributes. At 5.89 --

MR JUSTICE MARCUS SMITH: Just before you go to chapter 5, distribution. Where one distributes GIFs to third party platforms.

MR HOLMES: Yes.

MR JUSTICE MARCUS SMITH: I assume there is some sort of -- it may not necessarily be legally contractual. There will be some sort of protocol whereby the content is implanted into the message that is sent. Is there some sort of contractual arrangement or licence or understanding that explains how that works?

MR HOLMES: If you'll give me one moment, I'll just take instructions.

MR JUSTICE MARCUS SMITH: Of course.

MR HOLMES: My understanding is there are contractual arrangements with the

various distribution partners when GIPHY distributes GIFs other than via its owned and operated channel.

MR JUSTICE MARCUS SMITH: But no payment is involved in that?

MR HOLMES: That's correct, yes. I am told that it depends, sir. So that may be a point to come back to.

The short point that I was just about to develop --

MR JUSTICE MARCUS SMITH: Of course.

MR HOLMES: -- is that there's an assessment in the decision of GIPHY's position in relation to all of these various activities and -- sorry. I have a wrong reference here.

At the top of page 587 you see the finding that:

"The social media platforms have very limited close alternatives to GIPHY, for the following reasons. The distinctive quality of GIPHY's content and search algorithm and its sizeable reach among the major distribution partners and the fact that Tenor is GIPHY's only sizeable and close competitor, as it offers a service of broadly similar quality", and you will see the confidential text that follows.

The point is that GIPHY was a powerful presence on account of the quality of its offer, which was assessed in the decision.

There's also evidence, of course, about Meta's assessment of the quality of GIPHY's offer.

You see at paragraph 7.33 or 7.34 that Facebook recognised GIPHY's role as an innovator and saw the creativity of its team as an important driver in its decision to acquire GIPHY. There's then a quotation from a Facebook employee.

"It is easier to find engineers that can write code. What's hard to find is those who

can do that with creative mindset, who understand how consumers think and can build products that are meaningfully important to consumers. GIPHY had those products. They just weren't some of the core parts of their business. You know, they had this GIF search engine but they also had, you know, creative effects and they had a camera tool."

So a positive assessment from Facebook of GIPHY's role as an innovator.

Investors also identified the importance of the user base that GIPHY had acquired in conversations with the CMA.

Just to pick up a couple of those references, at 6.109, you see this reference to a document prepared by JP Morgan in connection with GIPHY's options for external fundraising, in which JP Morgan noted that it has high confidence that a GIPHY -- and you can see confidential text -- "to fuel near term organic growth will be broadly well received. JP Morgan explained it made this statement on the basis of its extensive experience of fund raising in the tech industry. Its view was reached on the basis that GIPHY was a well-known brand that was used by circa 800 million people daily."

Then, looking over the page, you see the views of one particular investor, Playtika, a large digital entertainment company, one potential new investor, with whom the CMA discussed.

At 6.112 you see that Playtika's interest in GIPHY was driven by the fact that GIPHY had a high number of active users and was building an ad product which could be significant if executed well.

6.113:

"Playtika compared the potential of GIPHY to the likes of Google and Facebook, noting that it had a very high number of active daily users and its daily search volume was equivalent to 15% of Google's. In Playtika's view this effectively

made GIPHY the third largest search engine in the world."

Then there's confidential text, which I would ask you, please, to read in 6.114.

(Pause.)

In summary, GIPHY had a large and established user base. It transacted very large volumes in supplying GIFs in the UK and internationally, and that user base was a significant feature of its position in the market.

With those points in mind, if we could just go back to 7.2 at 676. We have looked at the first point, GIPHY's position as a leading provider of GIFs. There is then in the sixth line down a discussion of GIPHY's entry efforts in relation to advertising.

"Prior to the merger, GIPHY was seeking to build on its success as a GIF provider by monetising through its innovative Paid Alignment service ..."

Paid Alignment is the new offering, the innovative product that GIPHY was seeking to roll out. As the CMA goes on to explain:

"Before the merger, GIPHY had made some progress in attracting advisers, advertisers and third party platforms to this service in the US but hadn't yet entered the UK market, and was continuing to develop and extend its Paid Alignment offer."

The final point in the paragraph:

"The type of advertising that GIPHY was developing prior to the merger through its Paid Alignment services would have been a close substitute for display advertising services of the type offered by Facebook."

So, as explained in 7.2, GIPHY was seeking to develop and extend an innovative product in the form of its Paid Alignment offer, which on the CMA's analysis would compete closely with Facebook's services.

The Paid Alignment product is further explained in paragraph 7.35 on page 687.

You see that it was a novel form of digital advertising, which allowed advertisers to ensure the prominence of GIFs which promoted their brands on GIPHY's services. The GIF could include product placement within the GIF, celebrity endorsement, the inclusion of a brand logo, and these GIFs could be aligned with specific search terms, so that when a user searched for that term, the branded GIF would be first or prominent among the search results. Paid Alignment also allowed advertisers to insert their GIFs into GIPHY's trending feed on its O&O site.

PROFESSOR CUBBIN: Could you just explain, would these be searches for GIFs or just general searches.

MR HOLMES: For GIFs.

PROFESSOR CUBBIN: At present at any rate.

MR HOLMES: At present at any rate, exactly, yes. that's a point that distinguishes them from a general search engine like Google. You will have seen in the market definition section, the reason why the CMA finds that this form of advertising is not like search advertising is because users who go on a website and search on Google or Bing and search for a product name are quite likely to be out to buy that product or may very well be. So search advertising is then targeted at capturing those in-market consumers, whereas here the search is for a GIF. It is for a particular type of message you want to send to a friend to convey a particular emotion or to capture, you know, a particular idea. The advertising that is embedded in that is more in the nature of a promotion of a brand. So if you search for doughnuts, you might see a sign for Dunkin' Donuts. You couldn't click on the Dunkin' Donut logo and go through to the Dunkin' Donut website, at least as the proposition is currently planned. It would just be included in the message which is currently

sent. Does that answer your question?

You see from 7.40 that the effect of the merger was to terminate GIPHY's efforts at developing this product which the CMA considered to be an innovation. As explained there:

"Following the merger, Facebook required the termination of all GIPHY's existing Paid Alignment arrangements and the cessation of all GIPHY's revenue generating activities."

Against that background, the CMA sets out to analyse whether, by reason of this termination, the merger would give rise to a loss of dynamic competition, amounting to a substantial lessening of competition in the UK. The CMA's analysis of that competition is quite involved. It rests on a large volume of evidence, which I will not go through in detail. It is really not necessary to do so, because I don't think that's central to Meta's case on ground 1, but I will recapitulate the main conclusions which led the CMA to find that there was a horizontal SLC.

There were four components to that.

First, the CMA assessed the importance of GIPHY's efforts to innovate and expand.

Secondly, it considered the likelihood of expansion and of UK entry by GIPHY.

Thirdly, it examined the closeness of competition between Paid Alignment Facebook's display advertising.

Fourthly, it assessed the likely response by Facebook, and others, absent the merger, to GIPHY's continuing efforts to continue and expand.

Taking those points in turn, on the importance of GIPHY's efforts to dynamic competition, the CMA's analysis is contained in paragraphs 7.30 to 7.49. It is worth pausing over 7.42, where the CMA notes that:

"GIPHY's efforts through Paid Alignment to build and monetise its services were

particularly relevant because", first point, "this is a market in which investments in entering and expanding represent an important part of the competitive process.

Secondly, digital platforms operate in an industry where the process of entering and expanding takes place over a long period of time and involves significant costs and risks. Commercial success in digital markets can typically involve building an audience" -- the eyeballs to which you referred, sir -- "and then developing a way to monetise that audience."

Third point:

"Following the merger, we do not consider that any other potential player is playing or is likely to play a similarly important role in the dynamic competitive process. GIPHY has succeeded in building a global and UK audience for its GIFs. No other supplier had reached a material market share in the supply of GIFs, apart from Tenor. GIPHY have made substantial progress towards establishing its monetisation model, and any business seeking to enter the market for searchable GIF libraries faces significant barriers to entry in both GIF provision and ability to monetise through display advertising."

So, in other words, GIPHY was in a unique position, as the CMA found, in part because of its very large installed base of users.

Then the conclusions are summarised on this point at 7.45 and 7.46. You see:

"GIPHY had achieved significant success in developing its GIF services. Widely recognised as an innovator and was continuing to innovate to develop this product and to offer Paid Alignment. As such, GIPHY was making important contributions the CMA found to dynamic competition, particularly as a potentially close competitor to Facebook, a point which we will return to, which currently faces limited competition."

Then, at 7.46:

"We consider that GIPHY's efforts prior to the merger increased the likelihood of new innovations or products being made available in future, whether by GIPHY or by stimulating wider innovation by others responding to this competitive pressure. This would give customers the chance to benefit from a wider variety of products and increase competition."

The second question concerns the likelihood of GIPHY expanding its provision of the Paid Alignment offering in the market and of launching that product in the UK. That's addressed in paragraph 7.50 to 7.188.

As to the first part, the findings are summarised on page 731 at paragraph 7.168. If I could ask you just briefly to review that paragraph, please.

MR JUSTICE MARCUS SMITH: Of course. (Pause.)

MR HOLMES: So uncertainty as to whether entry and expansion efforts would succeed, but had they continued, they would have driven dynamic competition.

As regards the UK, the CMA summarised its finding on page 738, paragraphs 7.181 and 7.182. If I could ask you, please, to review those paragraphs.

MR JUSTICE MARCUS SMITH: Of course. (Pause.)

MR HOLMES: So a finding by the CMA based on the evidence before it that GIPHY was likely to have launched Paid Alignment into the UK. The key point at 7.181.

At 7.182, a secondary point.

"Innovation or efforts by incumbent firms in response to GIPHY would potentially also benefit UK consumers, whether or not GIPHY expanded internationally."

The third question concerned the closeness of competition between Paid Alignment and Facebook's display advertising. This is addressed in paragraph 7.189 to

7.195. You see why the enquiry was considered relevant at page 743 at 7.189:

"The constraint exerted by a dynamic competitor on other firms depends in part on the expected closeness of competition between those other firms and the dynamic competitor."

There are then reasons and evidence set out. They included an assessment of Meta's views on GIPHY's monetisation product at the time of the merger, and you see that at 7.203 and 7.204.

I would ask you -- we need not pause on it now, but it would be worth reading that at your leisure. What it shows is that Meta's rationale for the merger did include an assessment of the possible upside of monetising GIFs or stickers.

At page 745, you see at 7.195 the conclusion:

"We consider that GIPHY's Paid Alignment service would have been in close competition with Facebook's current display advertising offering in the UK."

The fourth and final question relates to Facebook's and others' likely response to potential competition from GIPHY, absent the merger.

The conclusion at paragraph 7.248 on page 762 is that:

"Facebook and others have shown interest in developing monetisation of messages and stories, an area of potential revenue growth for display advertising on which GIPHY's efforts were also focused. Absent the merger, as GIPHY continued to develop its GIF advertising products, Facebook would have had an incentive to respond to a dynamic threat of competition from GIPHY, and we consider this evidence supports the view that GIPHY was an important player in a potentially growing segment of the display advertising market."

PROFESSOR CUBBIN: Mr Holmes, could you perhaps explain in a little bit more detail the nature of the threat that GIPHY posed? Is it the threat -- maybe

I will let you expand on that?

MR HOLMES: The threat was that GIPHY would continue to develop its product and that that would take some portion of display advertising in competition with Facebook's offer. So Facebook provides display advertising. This is a close substitute for display advertising. Therefore Facebook would have an incentive to respond to the product, GIPHY's Paid Alignment product, with innovations of its own in the same space.

PROFESSOR CUBBIN: So the threat is that it would displace some of Facebook's existing display advertising?

MR HOLMES: It would win a portion of display advertising, which is the core business of Facebook.

PROFESSOR CUBBIN: Which therefore would make Facebook have to innovate in some other way, maybe by developing its own library or some other way that we can only guess at perhaps.

MR HOLMES: Yes. It would incentivise them to develop a product that would operate in the same or broadly similar space.

PROFESSOR CUBBIN: Okay, thank you. I just wanted to understand what picture the CMA had in mind of that threat.

MR HOLMES: Finally, in paragraph 7.254, you see that the CMA summarise its conclusions on substantiality based on all of the previous analysis and evidence. You see at (a):

"Display advertising market in the UK is one with limited competition, given Facebook's significant market power. That makes GIPHY's impact more significant."

Then at (b):

"GIPHY's pre-merger activities were valuable to the dynamic competitive process in

themselves and in driving other competitors' efforts. Given that GIPHY is an innovative and leading provider of GIFs and building on its existing strength, GIPHY had made concerted efforts to monetise its services by means of an innovative advertising model." The point at 2.

At 3:

"If GIPHY had extended its presence on third party platforms, those platforms would have had an incentive to collaborate with GIPHY, to further develop GIF monetisation."

Fourthly:

"GIPHY was seeking to enter a market with significant entry barriers on the basis of an innovative business model. GIPHY's efforts to monetize GIFs increased the likelihood of new innovations or products being made available and of existing providers of display advertising, including Facebook, making efforts to protect their future sales from increased competition".

That is the point we were just discussing.

Finally:

"Absent the merger, GIPHY was likely to have entered into the supply of Paid Alignment services in the UK."

Sir, those are just a very whistle-stop tour of the reasoning and analysis in the decision.

If I could now turn to consider the first ground of Meta's application for review. The underlying complaint is identified as the absence from the report of any assessment of the extent to which GIPHY would, in the counterfactual, have expanded and/or succeeded in the relevant UK advertising market, and absent such assessment, it is said that the CMA lacked grounds for supposing that GIPHY would be likely to become a significant competitive

threat to Meta. What is said is that the CMA ought to have assessed the likely future market share or revenues of GIPHY and the likely co-relative loss of profit or likely potential loss of profit on the part of the incumbent, Meta.

This argument focuses on the extent of GIPHY's expansion post-entry in the UK, in terms of market share that it could be expected to capture, or the revenue that it would generate, or the profits its expansion would lead Meta to lose. But, as the Tribunal has seen, the CMA's concern rested on a loss of dynamic competition resulting from the merger. It was not a case based on the loss of future competition, the other category of competition identified in the guidelines in relation to mergers involving potential competitors.

That dynamic competition, as it is set out in the decision, doesn't turn on whether Meta was likely to achieve any particular scale of activity in the UK market. On the CMA's case, dynamic competition was already occurring by reason of Meta's efforts to develop its Paid Alignment product, and absent the merger, as the CMA found, that dynamic competition would have continued, generating a consumer benefit in the UK as a result of the chance of innovative products being launched.

The CMA's case had been evidence base relating to that finding of dynamic competition.

As the guidelines observe:

"Harm may result to dynamic competition where a potential competitor's efforts are terminated, although the prospects of those efforts succeeding are uncertain."

So, in my submission, the CMA did not need to reach conclusions as to the extent of GIPHY's likely expansion or success in the UK market or of the profits it would make. There was nothing unreasonable in the CMA's line of analysis of harm to dynamic competition.

So my first submission is that ground 1 rests on a misconception. The metrics identified would be of relevance if the CMA's case rested on GIPHY's contribution to future competition post-entry, but they make little sense when directed to a case where the case is about GIPHY's contribution to current and ongoing dynamic contribution which the merger will remove as an independent source of competitive interaction in the market.

Looking further at the two limbs of the ground, ground 1A alleges that the CMA is misinterpreting the statutory test under section 35 (1) (b) of the Enterprise Act. Meta's argument is that there must be an assessment of the extent of the lessening of competition, in order to show that it is substantial and that this required assessing whether GIPHY would have become a significant competitive threat.

In my submission that's not really a debate about the construction of the statute. The disagreement between the CMA and Meta is about whether the CMA has adequately justified its finding of substantiality based on the competition concern which it identifies relating to dynamic competition already in the market, and that may have been expected to continue whether or not Meta's product was ultimately successful.

The case law makes clear that the assessment of what amounts to a substantial lessening of competition will depend on the context and the nature of the CMA's competition concern. We say that's the true import of the Global Radio case and of the South Yorkshire Transport case.

If we could just go to Global Radio again. That's in authorities bundle 3 at tab 61. So this was a merger case in which the applicant contended that the CC had misinterpreted the meaning of "substantial" in the context of "substantial lessening of competition".

Picking it up at page 1845, paragraph 18 sets out the applicant's case:

"In this context 'substantial' means large, considerable or weighty."

The CC's position is at paragraph 19:

"The Commission accepts that it did not specifically ask itself whether the lessening was large, considerable or weighty but maintains it was under no obligation to do so. According to the Commission, it correctly directs itself to consider whether the lessening competition was substantial, applying its published guidelines."

The Tribunal's analysis begins at 20:

"The word 'substantial' is certainly capable of signifying large, considerable or weighty, confirmed by the House of Lords in Palser v Grinling. One of the issues in that case ..."

I don't think we need trouble ourselves with that. Then, at paragraph 21:

"'Substantial' was not, however, held to mean large, considerable or weighty in the South Yorks Transport case."

You see that that case concerned section 64 of the Fair Trading Act. The House of Lords had to consider the meaning of a substantial part of the United Kingdom. Lord Mustill, with whom the other members of the House of Lords expressed agreement, noted that the word "'substantial' is protean in nature, "capable of meaning not trifling at one extreme and nearly complete at the other".

Then in the quotation from that:

"It is sufficient to say that although I do not accept that 'substantial' can never mean more than de minimis" -- the point that Mr Jowell focused on -- "I am satisfied that the word does indeed lie further up the spectrum. How far up is another matter. The courts have repeatedly warned against the dangers of taking

an inherently imprecise word and, by redefining it, thrusting on it a spurious degree of precision. I will try to avoid such an error. Nevertheless, I am glad to adopt, as a means of giving a general indication of where the meaning of the word lies within the range of possible meanings, the expression of Norse LJ 'worthy of consideration for the purposes of the Act'."

Then, at paragraph 22, a further point that emerges from Lord Mustill's speech in South Yorkshire Transport:

"Views could potentially differ as to whether a part of the United Kingdom was substantial."

Picking it up towards the foot of the quotation:

"Even after eliminating inappropriate senses of 'substantial', one is still left with a meaning broad enough to call for the exercise of judgment rather than an exact quantitative measurement. Approaching the matter in this light, I am quite satisfied that there is no ground for interference by this court, since the conclusion at which the Commission arrived was well within the permissible field of judgment."

Now, I take from this case both -- I should say that this interpretation was held to apply in Global Radio equally in the context of substantial lessening of competition. I take from this case that the meaning of "substantial" will depend on the circumstances and will also depend on why the authority regards a particular merger as worthy of consideration for the purposes of the Act, taking the formulation that Lord Mustill endorsed from Norse LJ.

"One should not thrust on the word a spurious degree of precision. The CMA's assessment of substantiality calls for the exercise of judgment rather than any quantitative measurement, and the judgment should only be impugned on a judicial review if it is outside the permissible field of judgment, in other

words, by a reasonableness standard."

So no general requirement to engage in any quantification of effects by reference to any particular or universal metrics.

That's confirmed in another subsequent merger review judgment in the case of Toby. That is in the authorities bundle 4 at tab 86. We shall just have time to look at that case before you need to rise, sir.

If we could start at page 3058, you see at paragraph 338 at the end of the paragraph that the applicant in that case, Toby, was alleging that the CMA erred by not establishing that the SLC was substantial.

Looking down the page at 340, reference is made to Global Radio and the Tribunal notes Global Radio's submission that substantial lessening of competition meant large, considerable or weighty and that this was rejected.

Turning on to page 3074, you see from the heading at the top of the page the submission which the Tribunal was turning to address, namely:

"Did the CMA err in law in failing to identify the extent of any lessening of competition and thus whether it was substantial?"

That, of course, bears similarity to the point that Meta makes in its skeleton argument at paragraph 13. It says there that:

"It is clear that there must be an assessment of the extent of the lessening of competition to meet the substantiality test."

As the Tribunal held in Toby, that line of argument is inconsistent with South Yorks Transport and with Global Radio. If you could turn on in the judgment to page 3076, you see at paragraph 392 that:

"Global Radio makes it clear that the authority is not required to show that the SLC is large, considerable or weighty."

On that basis the Tribunal rejected Toby's contention that the CMA was required to

quantify the SLC.

It then turns to examine Toby's argument that any price increase post-merger would be de minimis in the same paragraph, and the Tribunal ...

Just pausing there, Meta makes a very similar claim at paragraph 11 of its skeleton argument, where it alleges that:

"GIPHY would have gained only a minute proportion of the relevant market within any reasonable period."

But the Tribunal rejected the de minimis point that was advanced in 393 -- that was advanced by Toby in this case.

"Having regard to the nature of the competition authority's concerns", as you see at the top of page 3077, "those concerns were not confined to price but included other non-price terms, including fewer new products being developed. Even if the price increases would, in fact, be de minimis, Toby had not shown that the SLC conclusion as regards the non-price effects was unreasonable or irrational."

In my submission that ties in with Lord Mustill's characterisation of "substantial" as meaning "worthy of consideration for the purpose of the Act". On that approach what is required will depend on the reason why -- what's considered substantial will depend on the reason why it was regarded as worthy of consideration, what the competition concern is which motivates the authority's investigation.

You have my submission that in this case the CMA was concerned with a loss of dynamic competition, including the competition that GIPHY's efforts already represented. Such competition can play out regardless of whether a potential competitor's efforts lead eventually to successful entry or expansion. In my submission it is therefore not a fair or reasonable objection to the CMA's

report that it did not quantify the share of the market that GIPHY could expect to achieve following entry. That just does not go to the concern that the CMA had identified.

Sir, if that's a convenient moment.

MR JUSTICE MARCUS SMITH: Yes. Thank you very much, Mr Holmes.

I just have one question. I don't want an answer to it now. It really arises out of GIPHY's business model, which I think I need better to understand in order to really understand the questions we are being asked.

MR HOLMES: Yes.

MR JUSTICE MARCUS SMITH: It seems to me that GIPHY was somewhat awkwardly placed as what I might call an independent complement to social media communication, and please excuse any sort of technical errors about that, because that's an area I think I am going to have to educate myself in as well, but an independent complement is quite an awkward position for a company to sit in.

So it seems to me GIPHY was a complement, because actually the GIFs was providing a library to and the search functions to was part of the communication provided by others, whether that be WhatsApp or anything else, but it is an independent complement, because it provides the service to those communication providers as a third party. So we have that contract between GIPHY and WhatsApp or whatever it is that we mentioned earlier.

So given that's the sort of position that GIPHY is at -- I know that there are direct searches in the library and one can make a direct search if one goes to GIPHY's app or to the website, but that's not really why one uses GIPHY I don't think. So what does GIPHY do if it wants to monetise its offering?

Now it could do so by simply charging those who are providing the messaging

service. So for every GIF that's included WhatsApp would pay a certain amount, but that's not the route that was gone down and one can understand perhaps why. So they have gone down the route of what we call Paid Alignment, but it is really a form of charging for the advertising, the eyeballs that we discussed earlier.

My question really is how exactly was GIPHY going to do that, because you've either got a search engine which operates within a message -- in other words, I am WhatsApping away. I decide to include a GIF. I then within WhatsApp or whatever other message I am using use the search facility to the GIPHY library but within the message, and then I identify the GIF that I want and plug it in.

Now that implies a rather more limited universe of eyeballs in terms of advertising advantage than perhaps through let us say other forms of advertising, but that's one way; in other words, the GIPHY library is accessed almost parasitically through the message one is compiling.

The alternative is, looking at the example that I think was provided by Meta of Paid Alignment, that you enter a search term and get ads coming up in response, and that is much more like the Google model of entering a search term and getting a series of hits back, the top few of which are paid for ads and the rest are what you actually want. Sorry. I am being tendentious.

But my question there is: what platform would GIPHY be using to provide that? I mean, would they do a deal with Google so that you could search for GIFs responsive to a particular term or would they set up their own independent search ...? I suppose what I am really grasping for is I understand how access to the library operates through a message.

MR HOLMES: Yes.

MR JUSTICE MARCUS SMITH: I don't really understand how Paid Alignment operates independently of that. I don't know whether I should in order to understand the competitive dynamics that are going forward. So there's a sort of lack of clarity about how it is that GIPHY are going to monetise this, and I think it is important to understand that. I am sure it is here and it is just my failure to grasp it. I think understanding how they are going to monetise it does or may provide an insight into the competitive forces that are here at work, because at the end of the day we are talking about how one gets a profit out of these services --

MR HOLMES: Yes.

MR JUSTICE MARCUS SMITH: -- and the profit that we are talking about on both the Facebook/Meta and the GIPHY side is advertisers paying and they will only pay if they are assured that the right people are going to be looking at their products.

MR HOLMES: Yes.

MR JUSTICE MARCUS SMITH: I am sorry. That was a rather long way of articulating I think a confession of considerable technical ignorance, but I think if either of you could alleviate my technical ignorance, that would be much appreciated.

MR HOLMES: I am sure we will both take that question away and come back with our own answers. Whether they will align I can't guarantee.

MR JUSTICE MARCUS SMITH: Well, constructive tension is always a good thing in these things. So that would be very helpful. Thank you very much. 10 o'clock tomorrow morning or 10.30?

MR HOLMES: Perhaps we should say 10 o'clock to be on the safe side.

MR JUSTICE MARCUS SMITH: Very grateful. 10 o'clock it will be. Thank you very

much.

(4.16 pm)

(Hearing adjourned until 10.00 am on Tuesday, 26th April 2022)