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)

Digital Transcription by Epiq Europe Ltd
Lower Ground 20 Furnival Street London EC4A 1JS
Tel No: 020 7404 1400 Fax No: 020 7404 1424
Email: ukclient@epiqglobal.co.uk

Tuesday, 26th April 2022

(10.00 am)

(COURT IN PUBLIC SESSION)

Submissions on grounds 1, 2 and 3 by RESPONDENT (cont.)

MR JUSTICE MARCUS SMITH: Mr Holmes, good morning.

MR HOLMES: Good morning, sir. I will start, if I may, with the question that I raised for counsel at the end of yesterday's proceedings. Before I do so could I just hand up two sets of materials. The first is the CMA's examples in response to the Tribunal's letter before the start of proceedings. I will go to those during the course of my submissions on ground 2.

The second is a note in relation to the Tribunal's question, although I don't propose to use it as a speaking note. I might go to the visuals in a moment, but I will try to make my own submissions. So no need to read it for the moment.

MR JUSTICE MARCUS SMITH: Thank you.

MR HOLMES: Your question concerned the GIPHY Paid Alignment product, and the focus of the question was on how that product worked when GIPHY is accessed via third party platforms.

I will take it in stages and you must forgive me if this is too simple, but --

MR JUSTICE MARCUS SMITH: I doubt that very much, Mr Holmes.

MR HOLMES: Well, speaking for myself -- I was discussing with my learned friend -- my exposure to GIFs before the commencement of this case was extremely limited. I don't have any natural experience of the operation of this market on which to draw and I found these points helpful in setting the scene.

Just to begin by recalling the service that GIPHY provides. Obviously it offers a library of GIFs. A key part of that, a key component is the ability to search

that library, and that search function is provided by GIPHY's technology. It has its own algorithms, which decide what GIFs get served in response to a user's query.

The Tribunal may have played around with the GIPHY website just to experience this. You can go on it and have great fun. It is a great game for a wet afternoon. So you could enter a search term "eye roll", which I understand is a popular subject of GIFs, a GIF that one Tribunal member might send to another when listening to painful submissions before them or a junior might send when listening to their leader's efforts. That will bring up an array of short video clips of showing people rolling their eyes in an expression of exasperation or any other emotion or subject you might want to convey. You could search for joy or boredom, and there would be little clips responsive to those terms.

GIPHY owns and uses its own search engine technology for that. It does that on all platforms, whether on its own platform or on third party platforms in deciding what to serve up. So it doesn't need, in response to one aspect of your question, to partner with a general search engine like Google. It has its own search engine technology.

The Paid Alignment product obviously fits within this search function. Advertisers paid to link a GIF promoting their brand to particular search terms and then that GIF would be given prominent place in response to a search using that term. The term might be connected with the product, like coffee, or it might be a more general search term, "joy", which renders a GIF which features the brand. It might simply have the Pepsi logo on it, for example. So far so good.

Now, as you noted, the particular magic of GIFs is when accessed and used as an adjunct to communication, for example, messaging and social media. It is

often said that a picture is worth a thousand words and the same might be said of a GIF. It's a pithy way of communicating.

Third party platforms which are involved in communication in one way or another want their users to be able to access GIFs. In the case of social media, as the decision found, they are an important way of driving user engagement. For your note, there's evidence about this in paragraphs 8.60 to 8.77 of the decision.

As a result, lots of third party platforms are happy to give their users access to GIPHY as the main provider. They build that access into their products. This is not just messaging apps like WhatsApp. It is also social media platforms of other kinds where users can post content. Another important distribution channel as a way of getting into messages is mobile phone keyboards.

So, for example, GIPHY had a deal with the mobile device manufacturer Samsung, which I think has the largest share of the UK android market. Phone users can use their Samsung keyboards, which have a GIF button linked to GIPHY. There are popular third party keyboards you can download. For example, Kika. That also has a GIF button. You will see reference to these keyboards in paragraph 4.10 (c) of the decision.

Via all of these distribution platforms users can access GIPHY's service. When a user clicks on the GIF button, they are connected to GIPHY and they can use GIPHY's search facility. They can type in a search and they are then served responsive GIFs.

This is where the note might come in handy. If you look on the first page, it is just a -- I was oblivious I must say of this functionality on WhatsApp, but you mentioned WhatsApp. Down at the bottom of the page you see where the red arrow is, that's superimposed on the screenshot for illustrative purposes. You

see "GIF". When you click on that, that pulls up a little box at the bottom. Do you see the little -- I must say my eyesight struggles with it -- the little magnifying glass at the bottom.

MR JUSTICE MARCUS SMITH: Yes.

MR HOLMES: You can search. So you have a trending feed I think. That's what those pictures are, new and trending. Then you have the opportunity to type in your term "eye roll", whatever it might be, in order to find a GIF.

MR SIMON HOLMES: I think I know the answer, but just to be clear. I too have been playing with the GIFs, despite the fact I've got an Apple phone and I am using WhatsApp, which is a Meta product, when I press on the GIF function and I put in a search term, as I have been doing, that technology now will be that of GIPHY, if it's a GIPHY -- if I have been allocated to GIPHY, or if I have been allocated to Tenor, it will be Tenor technology.

MR HOLMES: Exactly, Sir. It will depend on who the partner is using to provide GIFs. They might use several or just one GIF provider.

MR SIMON HOLMES: Understood. In other words, I don't need to go anywhere near the GIPHY or Tenor app. I go through my chosen message of social media.

MR HOLMES: Quite right. When they type a search, the GIFs they are served with are GIPHY's search engine technology that serves them up. In principle, GIPHY's Paid Alignment product could, therefore, be rolled out on third party platforms when it's serving up search results to users in just the same way as when users use GIPHY's own website. It is still GIPHY that provides the search function and decides what results are shown. Does that make sense?

MR JUSTICE MARCUS SMITH: Yes. I mean, what you are saying is that you -- let us say you are Pepsi and you are paying for alignment so that Pepsi products

come up higher than they otherwise would if certain search terms are entered on the GIPHY search engine. That process of payment and promotion will operate whether one is doing the search on the GIPHY website or through the GIPHY app as it would if you were doing it on a WhatsApp platform and simply accessing the search through the search functionality that is GIPHY's, but accessed through the messaging service.

MR HOLMES: Sir, the answer to that is in principle it could. That's subject to a caveat which I will come on to in just a moment. Mr Jowell, of course, can add anything in due course if he wishes to do so.

MR JOWELL: I will just say this. One needs to distinguish between the technical ability to do that and legal ability to do that.

MR HOLMES: Considerations of the latter kind I will come to in a moment. I think we are adverting to similar matters.

The only slight hesitation I had in the way that you framed your question was of the reference to Pepsi products. It is a point that will be of relevance when we come on to consider ground 2, market definition, but I know that the Tribunal has well in mind that what is served up is GIFs, these little endlessly repeating video clips, they are not adverts for products in the same way as Google serves up, and I know that the Tribunal did not intend that.

MR JUSTICE MARCUS SMITH: No, not at all. One might, for instance, if one put in instead of an eye roll a fast car or something like that.

MR HOLMES: Yes.

MR JUSTICE MARCUS SMITH: One might see through Paid Alignment an Aston Martin might be promoted above a Maserati, even though both are, as it were, equally responsive to that particular search.

MR HOLMES: Yes. Exactly.

MR JUSTICE MARCUS SMITH: Of course, one is not talking about advertising in the way in which one does on Google, but perhaps that is just underlining the fluidity that Mr Jowell was referring to yesterday, that advertising is really what works for the party selling a given good or service, rather than the kind of segregation of types of advertising, which no doubt appeals to lawyers, but perhaps appeals less to those who actually are paying for the advertising to sell their products.

MR HOLMES: Yes. As we will see, the CMA considered evidence about what advertisers identified as the role that advertising played, and there is a distinction between, on the one hand, display advertising, and on the other hand, search advertising. We will see how that maps on to the Paid Alignment service when I come to ground 2.

I think we are absolutely on the same page in relation to the technical ability, as Mr Jowell helpfully put it, for the Paid Alignment product to fit within searches undertaken on third party platforms.

PROFESSOR CUBBIN: Can I just ask if the search is any way personalised? So if I am using Google or looking for a movie, it seems to know pretty well that I might be interested in gardening, say, or certain times of movie. Does GIPHY know anything about me like that and use it to get better results back?

MR HOLMES: It is a very interesting question. I don't myself know the answer. So I suppose the question is do they gather information about particular users which could then inform the GIFs which are served, for example, before a search is undertaken? I think the answer is no, but I will be corrected -- yes. That's a point of distinction with some of the targeting which goes on in relation to display ads on other platforms.

PROFESSOR CUBBIN: Okay. Thank you.

MR HOLMES: Now there is, of course, a question about whether third party platforms would permit GIPHY to use their platforms in order to monetise --

MR JUSTICE MARCUS SMITH: Now you are moving from the technical to the legal.

MR HOLMES: To the legal and the commercial, indeed. The CMA investigated in the report whether this presented any kind of a decisive obstacle to the operationisation of the Paid Alignment model and found that it didn't. So platforms might, of course, be prepared to permit GIPHY to monetise without necessarily expecting a share of the revenue.

Just to show you some of the evidence about this that one finds in the decision, the GIPHY product, as you may have found, is discussed in appendix F of the decision at tab 25 of bundle 2. If you turn to page 996, you see at paragraph 23 a note of a call between a party and Facebook's strategic partnership team. The date is confidential, but you can see that at the start of the paragraph, and you can see the identity of the person and also in the brackets what the context of the call was. Do you have that?

Then, if you just look at the text, it sets out a particular view expressed by the Facebook representative on that call and at that time.

MR JUSTICE MARCUS SMITH: Mr Holmes, just to pause on my understanding of the markings on this, is the significance of the box with the red X by it that this was once confidential but now no longer is?

MR HOLMES: You may have a later version of this document than I do. I don't have a red box, but if you do that gives me great assurance that we can discuss this. It looks as though there's no confidentiality in relation to this passage and so I can be more direct.

MR JUSTICE MARCUS SMITH: That's fine. I just wanted to make sure I had

understood the markings that Mr Jones explained to me last time correctly.

MR HOLMES: The point is just, and I am not suggesting this was Facebook's attitude at any later time. It is simply to note that it's not inevitable that a third party platform would require a revenue share, and that quotation provides some evidence of that.

If you look at paragraph 24 -- is this also now non-confidential? No, it is still confidential. You see that various platforms entered into revenue share agreements. So, in other words, some platforms might expect to obtain some of the revenue that GIPHY obtained, given their role in distribution. That makes sense. The evidence shows that GIPHY was able to conclude revenue share agreements with a number of platforms. You will see the proportion of traffic which the agreements mentioned -- just two of the agreements mentioned there accounted for of GIPHY's -- I am not sure I can mention the metric, but you see my point.

MR JUSTICE MARCUS SMITH: Yes.

MR HOLMES: You can see the substantiality of that share. You may have picked this up, but "API/SDK" is just the language to describe the link with a third party platform. So it shows you a proportion of the traffic that goes via third party partnerships.

So even if GIPHY did not succeed in reaching agreement with all of its partners, it did manage to do so for a portion of its traffic, and you see the scale of that. That could provide a workable basis for the product whether or not other platforms allowed Paid Alignment.

Business was still in discussions on the subject of other potential monetisation deals. That is explained in, for example, paragraph 25 and in subsequent paragraphs. You see, for example, at paragraph 28 a discussion of a call. At

29 you see the views of an investor about the scope for further deals.

Just to tie this up, if you turn back in the decision to 7.87, you see what the CMA thought about revenue share agreements. So not an obstacle to viability. You will have an opportunity to reply, Mr Jowell.

So in answer to your question, the fact that GIPHY produced an independent complement did not leave it without a viable model to monetise. It had a valuable and important input for third party platforms and it was able to reach agreements with distributors, important distributors, which gave it a means of monetising eyeballs. It didn't need to be integrated with just one platform in order to make its Paid Alignment product work.

Does that go to the gist of your question? Have I correctly understood?

MR JUSTICE MARCUS SMITH: That's very helpful. What you are saying is that this is in itself a facet of a market where there is the need for agreement between GIPHY and whatever platform it is that's being used, whether it's a messaging service or something else. We will just call it a platform. There has to be agreement so GIPHY has a presence on there. There will then be a question of what the terms of that agreement are. That will depend upon the exception of the extent to which GIPHY's presence on the platform augments the platform. If lots of people want to use GIFs in their messages, then there will be a degree of desire on the part of the platform to have GIPHY in, which will no doubt affect the terms on which that participation is allowed. If, on the other hand, it is GIPHY that is keener to be on the platform than the platform to have it, the monetisation question is likely to loom rather larger in terms of what share of the revenue flow that GIPHY accumulates passes by way of its contract to the platform. At the end of the day it is all a question of negotiation. If you can't agree, it just doesn't happen.

MR HOLMES: You can see that factors of that kind would inform discussions about how one might cut the cake. The decisive point for present purposes is the CMA looked to see whether there were any fundamental practical difficulties or objections to this Paid Alignment model. It did so at length. The suggestion that the CMA lacked a rational basis for finding that this was an important innovation which had a role to play, that's not a tenable submission, I would say.

MR JUSTICE MARCUS SMITH: No, indeed. We will obviously have (inaudible). We will not draw on that at this stage at least. Just to shoot one hare that I think was set running yesterday, I think the suggestion came either from the Tribunal or counsel that there was some kind of randomness, in terms of which particular GIF search engine would be available from a particular platform. I take it that that is unlikely to be the case. It will be contractually stipulated as between the platform and the GIF provider what access you get. If I am on my WhatsApp, let's say, I may have access only to the GIPHY search engine or I may have Gfycat or some other rival up there. That will be a question of agreement between various actors in play. It certainly won't be a random phenomenon, unless the randomness is contractually agreed, I suppose.

MR HOLMES: Yes. It is not the case that -- depending on what the platform chooses to do and then arranges to do, it could decide to have more than one supplier of GIFs, and then it could allocate randomly particular searches as between more than one provider.

I understand, for example, Meta uses both Tenor -- this is not confidential, is it? I don't believe so -- and GIPHY, and it randomly allocates them to particular users. So that's one approach that a third party platform could adopt.

Equally, a third party platform might decide to use only one GIF provider. That might affect the arrangements that were then put in place.

So I think the suggestion of random allocation is not incorrect. That can and does happen in the market.

MR JUSTICE MARCUS SMITH: But it would have to be a contractually agreed randomness. I mean, put it this way. If you have a situation where GIPHY with platform X has an arrangement where GIPHY is accessible from platform X, and so there is a Paid Alignment fee sharing arrangement between platform X and GIPHY whereby a certain amount of the Paid Alignment revenues goes to platform X, I imagine GIPHY would have something to say if suddenly platform X decides that they are going to simply close out, by some kind of random allocation, certain persons from the platform without explicit agreement with in this case GIPHY.

MR HOLMES: Yes, that's a possibility. It doesn't seem an inevitability, at least from my perspective. I will be corrected if I am wrong. The revenue share agreement may be on the basis that where a sponsored GIF is served to those users with whom the partner uses GIPHY, the revenue would in that case be shared on a particular basis. So I don't think revenue sharing would necessitate prior agreement as to the circumstances in which those users would be --

MR JUSTICE MARCUS SMITH: No, not necessarily. All I am saying is that the notion of randomness will have to be consistent and subordinate to any agreement that is reached between platform X and let us say GIPHY, and if there's more than one provider of GIFs, that provider also. In other words, I have got no problem with randomness, but it is a very peculiarly ordered sort of randomness that we are talking about, given that GIPHY can't be on

platform X without the consent of both.

MR SIMON HOLMES: The way I'm understanding this, and correct me if I'm wrong, is that what we are talking about is the randomness of the allocation of the individuals, but the agreement might say, for example, with a platform that 50% of the users of that platform will be allocated to me, in this case, say GIPHY, and 50% to others, and Tenor might have a similar arrangement, but it is not -- the randomness goes as to which of those users are then allocated to GIPHY GIFs.

MR HOLMES: To take the points in reverse order, that is my understanding as well. In response to your question, yes, of course the practical and technical arrangements for allocation would need to be consistent with any contractual and commercial understanding that was reached between the partner and the GIF providers with which it dealt. Does that address your question?

MR SIMON HOLMES: That answers my question, yes.

MR JUSTICE MARCUS SMITH: It is a contractually approved randomness, if you will.

MR HOLMES: I am grateful to Mr Jones and Ms Mockford. Two references to the decision. I won't take you to them now, but in case it is helpful, this is discussed in 5.72 to 5.78 and in 9.43 of the decision.

So that addresses your question.

MR JUSTICE MARCUS SMITH: I am grateful.

MR HOLMES: By way of further context, and as regards the viability of the proposition more generally, there was evidence of significant advertiser demand for GIPHY's services. For your note, that's discussed in paragraphs 7.78 to 7.82 of the decision. So on the demand side of the advertising product, GIPHY's demand side for its Paid Alignment product,

there was advertiser demand. That fed into the CMA's conclusion that GIPHY's advertising model had important advantages which advertisers appear to recognise. For your note, that is in paragraph 7.166.

In the context of getting commercial approval for the merger, Facebook also assessed the prospects of monetising GIPHY's inventory. There is evidence about that in paragraphs 7.205 and 7.206.

All of that evidence supported the CMA's conclusion that this was an important innovation and that Facebook would have incentives to respond to GIPHY's product development efforts, absent the merger.

That's all I wanted to say on the broader context.

Could I now return to ground 1 and conclude my submissions about that? In this case the CMA found that the merger resulted or may be expected to result in a substantial lessening of dynamic competition within the UK display ad market.

Dynamic competition is just meant to refer to competition between firms to develop new products. Product development is obviously a dimension of the competitive process. A firm that's developing a product is competing within the market or markets for related existing products, in my submission, and it is competing before it launches its product. So a merger which leads a firm to stop developing a product before it is launched may, therefore, give rise to a lessening of competition for the purposes of section 35 (1) (b) of the Enterprise Act. That potential entrant is no longer competing to enter, and rivals are no longer incentivised to respond with their own efforts at product development in response. So that's the theory.

Of course, in response to questions raised by Professor Cubbin on the guidance, the CMA does not take the position that this competition to innovate, to develop

products, arises only on the part of potential entrants or that there is some special class of dynamic competitors, as distinct from competitors generally. The reason why the focus is obviously on potential entrants in chapter 5 is because that chapter is specifically considering the circumstances in which a lessening of competition might arise from people before they enter, and one way is if they are developing new products.

The guidelines focus on particular market contexts, where the losses of that dynamic competition may be more likely to constitute a serious loss, but that's not intended to suggest that dynamic competition does not operate in or can't operate in other markets as well.

So that is the approach that the CMA took.

PROFESSOR CUBBIN: Can I just clarify a point about before they enter? By "enter" do you mean start producing the product or start monetising the product or what?

MR HOLMES: That's helpful. Exactly. They actually start supplying the product or service following launch. That's I think what is meant. Of course, there are different relevant markets here, different economic activities. For example, GIPHY is already present on the user side in providing its GIF library. But when I say "before entry", what I mean is -- someone involved in developing a new product can be involved in a process of competition to develop a new product or product development before they actually launch that product and start selling it in the market. Does that --

PROFESSOR CUBBIN: Presumably, product development occurs usually before you launch?

MR HOLMES: Yes.

PROFESSOR CUBBIN: If you want to have a product that's going to be successful,

presumably.

MR HOLMES: Yes, although equally those who are already involved in a market will be involved or may, depending on the nature of the product in the market, be involved in producing new versions, new iterations. So there might already be a presence selling an existing version of the product while they are working to develop new versions that will appeal and improve the product in various ways.

PROFESSOR CUBBIN: I am trying to understand how this would differ, say, from the car industry where firms strive to improve their products all the time and have done for the last 100-odd years. They usually try to develop the product before they launch it, and they may already be in some part of the business, but you don't talk about the entry of BMW into the Mini market when they launched the Mini, for instance.

MR HOLMES: No, I understand.

PROFESSOR CUBBIN: It's a matter of understanding the way the language is being used.

MR HOLMES: Of course. I fully understand, and I take that point, but in the case of GIPHY, just to make it concrete, they were providing an advertising product in the US at the time of the merger, but they had not yet launched a product in the UK display ad market. The CMA had to consider whether in circumstances where they were still developing the product and they might yet launch it in the UK, the end to that process of developing their product could amount to a restriction of competition within the UK advertising market for the purposes of section 35, notwithstanding the fact that they weren't yet supplying advertising services in the UK.

My submission is that the process of developing the product which they were

engaged in was already part of a competitive process, because they were competing to develop a product that would be launched in the UK, was likely to be launched in the UK on the CMA's analysis. Does that clarify matters?

PROFESSOR CUBBIN: I think it clarifies a bit what your argument is. Thank you.

MR HOLMES: I am grateful. A merger which leads a firm to stop developing a product before it's been introduced to a UK market may give rise to a lessening of competition within that market for the purposes of section 35, and that's because the potential entrant is no longer competing. The rivals are no longer incentivised to respond. That's the submission.

MR JUSTICE MARCUS SMITH: I understand exactly the submission. I think the concern that is being articulated by Meta is that it is an approach that is fundamentally not easily justiciable. If you start with a purely static model, and I appreciate we are moving into terminological difficulties even with that word, but if you take an analysis of the market as it is at the moment, and you see that producing the same product in the same market you have got market shares of X and Y, and added together, for no very good reason, they create a dominant position of the merged entity, then the merger is likely to be disapproved. All you are talking about there is a very straightforward assessment of market definition and market share within that market, so defined. So dead easy.

Next iteration on, you have got what one might call organic growth to the market. So you have got two established competitors, again, in the same market. One has a market share which, on the static model, is small, and simply looking at it on a static basis you say merger won't be a problem because it is a minnow, but you might say you can look at projections as to how the market is evolving, and you can say: "Assuming no merger, in ten years' time the

minnow is going to be, to take Mr Jowell's metaphor, a whale. That's a concern that we have got. It is not a problem now, but looking into the future, we can say there's going to be a problem, and we want to avoid it, because we don't want in ten years' time a dominant undertaking in the market, because we don't like a very large organisation swallowing a minnow which is going to become a whale. We would like to have two whales".

Again, I quite easily understand that. It's a question of articulating the basis on which you're saying the minnow is going to grow in the way it is organically.

What I think your dynamic model is talking about is something which is much more like a shock to the market, where it is not a question of organic growth from a static position. You have something which is not predictable in that way.

Clearly, we can say that that has happened in the past. In exchanges with Mr Jowell yesterday, I suggested that the idea that the dominant incumbent in a market might not know where the shock is coming from and would be blindsided is actually in technology markets pretty common. You take the Blockbuster and video rental market. You take the camera film market. Both of those have been completely eradicated by blindsiding technologies.

Now, if you have a situation where someone is consciously aware of the risk, and taking it out, that's something which you can control for and look at. We discussed yesterday the subjective sense of the dominant party squishing competition to preserve its business model, but that's not this case, because no-one is saying that Meta was seeking to acquire GIPHY for that reason.

So what we've got is something which is, I think on the CMA's own case, peculiarly difficult to measure, and that I think is one of the difficult questions in this case, because what Mr Jowell was saying yesterday was: "Look, if you have your minnow and your whale, and the minnow is simply going to grow into

a slightly bigger fish, like a goldfish, then you can assume the goldfish, but it makes no difference. The acquisition by the whale of the minnow/goldfish makes no odds."

You are saying, of course, the minnow is something altogether more disruptive. It's a potential larger animal, larger fish.

The problem I think is how does one test for that in a manner that is something other than the carte blanche that Mr Jowell mentioned yesterday, because one can't I think have a situation where the CMA is simply saying: "In our judgment this is a dynamic case and that's that", because for every dynamic case where there's a huge success, you are likely to have multiple failures where actually a firm like Meta is doing the founders of GIPHY an enormous favour by taking a loser off their hands, because it sees some benefit in it for its own model.

I suppose my question is how do we test that within the parameters of judicial review -- and I completely particularly take the joint that this is a JR, not an appeal on the merits -- but nevertheless how does one kick the tyres of the decision to say: "Yes, we are happy that an entity like Meta can bring a proper challenge to the decision of the CMA and, when the challenge is over, be satisfied that it hasn't simply been a 'we say so, so it is' answer".

That's a short question resulting from a long preamble, but I think you have my point.

MR HOLMES: It is a very helpful question. The first point I would make in response to that is that you need to start with the statute and ask whether there is any impediment in the statutory language which would prevent one from considering a model of dynamic competition when determining whether there is a significant lessening of competition. In my submission, there is nothing to say that one cannot look at a dynamic process of competition as well as what you described as a more static situation.

I don't understand Meta to dispute that. I think it accepts that a loss of dynamic competition may give rise to a substantial lessening of competition for the purposes of the Act, and it also doesn't dispute I think that such a loss can arise from a potential entrant to a UK market stopping product development efforts prior to launch.

I think that would also not be disputed, but Mr Jowell will tell me if I am wrong about that.

The question then is how one applies section 35 (1) (b) in a case that involves dynamic competition. It may be difficult, but that does not mean there is any statutory bar to doing so.

The second stage is to ask whether the criteria that Meta identifies are the appropriate ones for assessing the significant lessening of competition which the CMA was positing and investigating in this case.

Meta says that the CMA must assess the extent of the likely future market share and/or revenues that the potential competitor would achieve, following launch of its product, and the likely co-relative loss of profit by the incumbent.

Now, if you accept me on the statute, this is not really a question of statutory interpretation. The question is whether, without those findings, the CMA's decision lacks a rational basis, and that any other approach would, as you say, give the CMA carte blanche to find an SLC whenever a potential entrant is involved in product development and is acquired by an existing player.

In my submission, the correct position on that question is as follows. First, the CMA is required by the statute to address itself to the question of substantiality. So there's no carte blanche. The question is whether it has shown a rational basis for finding substantiality on the material before it.

Secondly, the appropriate analysis for assessing what is substantial depends on

context and involves a measure of judgment. It needs to be tailored to the specific competition concern. The exercise, therefore, cannot be reduced to particular metrics, like future market share, that can be applied in all cases.

You will have seen in paragraph 27 the case law we cite there, the BSkyB case and JD Sports, both of which deprecate the imposition of any particular analytical framework on the CMA when assessing substantiality.

Thirdly, the concern here was about a lessening of the competition to develop in product development within the UK display ad market. In that context, my submission is that Meta's proposed metrics don't make much sense.

The CMA's concerns are not about the competition that GIPHY will exert as a result of the scale that it is expected to achieve in the UK market, what the CMA terms "future competition", which is of a static kind. They are about the lessening of competition that results from GIPHY's stopping its independent efforts to develop a competing product that was, as the CMA found, likely to be launched within the UK display ad market. That concern doesn't depend on the particular level of market share that GIPHY would ultimately be likely to achieve following launch.

So, fourthly, to assess whether the loss of competition in product development is substantial or not, one needs to engage in an enquiry that's targeted to that issue. In my submission, an obvious question to ask is how important is the innovation that is being pursued?

You have seen that the CMA considered and addressed that. On the evidence it had before it, it concluded that innovation was an important one in the circumstances of the relevant market.

Another obvious question is: is this product likely to be launched in the UK display market? If it is not, I can see it is very difficult to see how the efforts to

develop the product would have any significance for competition within that market.

Again, the CMA looked at that question and concluded on the evidence before it that the product was likely to be launched in the UK.

Yet another obvious question is how close is the product as a substitute for products currently sold within the display ad market, given that is the market on which the substantiality of lessening is considered? Again, the CMA assessed that and found it was likely to be a close substitute.

Finally, how likely is it that Facebook and other established operators would respond to GIPHY's products development efforts? The CMA looked at that too by reference to their incentives.

In my submission, the analysis in the decision thereby provided a rational basis for the CMA to conclude that the lessening of competition that resulted from the termination of GIPHY's product development was a substantial one. The product was an important innovation. It was likely to launch in the UK. It was a close substitute for Meta's existing UK display ad product. Meta and other established operators had an incentive to respond to GIPHY's efforts.

The CMA was not rationally required to sustain its case to predict the levels of market share or revenue that GIPHY would achieve in the UK or the co-relative loss of profit to Meta following launch.

Any such predictions would have been inherently very uncertain, and they are not addressed to the competition concern which the CMA have identified, which was about this process of product innovation.

You have my submission that there is nothing in the statute that dictates a requirement to assess the extent of the lessening of competition by reference to Meta's proposed metrics. It was not irrational for the CMA not to

apply those metrics. Indeed, the CMA expressly considered whether to do so and concluded that the metrics were not apt to address its concerns. You can see that in paragraph 7.183 to 7.188.

It might be worth just turning up the conclusion in 7.188 on page 742 of the decision. You see that it did not consider that the parties' submissions on GIPHY's potential scale are robust. In any event, it considered that even if GIPHY's initial expansion into the UK would have been modest, relative to Facebook, that wouldn't undermine GIPHY's importance to the dynamic competitive process. GIPHY was a leading provider of an important complementary service to social media platforms, had a large volume of traffic that it was seeking to monetise through Paid Alignment. The CMA considered, in that context, that its efforts to reach scale as a provider of ad services were important to dynamic competition.

In my submission, that's a rational basis for the CMA's decision not to consider the metrics that Facebook was inviting it to, and it doesn't give rise to carte blanche. The CMA must give reasons for the finding of substantiality and it must present supporting evidence for those reasons. Those can be tested according to well-established public law principles.

So Meta's threshold objection that the CMA was required to assess GIPHY's future market shares or revenues does not, in my submission, show that the decision was in error.

MR SIMON HOLMES: My question relates to the need for interaction or otherwise between the challenger and other parties. I think it's common ground that dynamic competition can consist of the efforts of the potential entrant to enter and expand and the efforts of the incumbent to respond to those, but your case, as I understand it, is that the absence of the latter does not mean that

there is no dynamic competition at that time.

MR HOLMES: Yes.

MR SIMON HOLMES: I understand that each of those elements, including the first element, the efforts of the potential entrant, can be beneficial to consumers. They are developing new products, trying to enter and expand and so forth. But is that competition, in and of itself, without any interaction or response from the incumbent? The MAGs refer to interaction, but in the context of -- it is self-evident -- the response by the incumbent is a reaction, but I think you are saying that that's asymmetric. If there is a reaction by the incumbent, that is by definition a reaction, but you are saying if you have the former, the effort of the potential entrant, that doesn't need in itself to elicit any form of reaction. It is sufficient that there would be incentives for the incumbent or other parties to respond at some stage in the future, for the merger.

MR HOLMES: That is correct. I make two points in support of that. The first is the effort of the acquired party to bring forward an innovation, a new product, can itself be understood as competing. They are involved in a process of competition. They are competing to enter with that new product.

MR SIMON HOLMES: Without more. That is already competition?

MR HOLMES: That in my submission is already competition, but I don't need to go that far, because the CMA already considered what response those efforts may be expected to invoke. Of course, the formulation is not only competition significant lessening that has resulted but also that may be expected to result.

In my submission, it is a perfectly rational way of assessing the position of incumbents, of established players, to consider what their incentives are in the light of those efforts and as those efforts are ongoing. The CMA did that.

So I don't accept that in order to prove its case the CMA has to show a document

indicative of an existing response. It is enough to assess whether such a response may be expected when determining whether a substantial lessening of competition has or may be expected to result.

Does that address your question?

MR SIMON HOLMES: Yes, it does. I understand your position. Thank you.

MR HOLMES: Thank you. Unless there are further questions on ground 1, I propose to turn to ground 2.

MR JUSTICE MARCUS SMITH: I think just this. The balance of probabilities, which you are both agreed is the test to be applied in section 35, it's a question I suppose of what one has to be satisfied of for purpose of the balance of probabilities test. I think you would be saying that if one were to say one needed to be satisfied on the balance of probabilities of a certain type of organic growth in GIPHY in the future, that might be one way of dealing with a merger, but it is not this case, and so what needs to be established on the balance of probabilities is a substantial lessening of competition that is of the dynamic nature that you are articulating or the decision articulates?

MR HOLMES: Yes.

MR JUSTICE MARCUS SMITH: The point of a 5% chance of a massive disruption can, in and of itself, be a satisfaction of the balance of probabilities test, because although the chances are small, the risk of an anti-competitive outcome is so great that you should take into account both sides, as it were, of the equation when deciding whether the balance of probabilities test is met.

MR HOLMES: Yes, exactly so. What the CMA has to be satisfied of on the balance of probabilities is that there has or may be expected to be a substantial lessening of competition. Whether that's the case depends on the competition, the way in which competition is affected, the type of competition

that forms the focus of the CMA's assessment. If the substantial lessening of competition takes the form of a reduction in the competitive pressure of a static kind then, as you say, the shares may very well be relevant to that. But where the focus is on dynamic competition, what the CMA needs to be satisfied of is that, on the balance of probabilities, it regards the merger as producing a substantial lessening of competition of that kind, and by reference to metrics relevant to or assessment relevant to that theory of harm.

So the CMA did consider that question and it was so satisfied. I mean, needless to say -- I know the Tribunal has this well in mind -- the question before this Tribunal is not whether you are satisfied on the balance of probabilities. It is whether you think there was any public law error in the CMA's assessment, whether it lacked a rational basis, using the material before it.

You have my point that we equally would not accept that this was a 5% type of case. The CMA found that GIPHY was likely to enter the UK market and that that likely entry was in an important area of competition, where Meta had substantial market power, and where the innovation was an important one. So we would not accept the premise of the question either.

Subject to any further questions, those are my submissions on ground 1.

MR JUSTICE MARCUS SMITH: One last question then. Let's take as read that the decision can be rationally justified on public law grounds, but that it is not a predictable decision, in the sense that before the CMA gets involved it is actually quite difficult to work out which way the CMA will go, because assessing dynamic competition is rather more difficult than assessing the problems of a static competition merger, because you know what you are looking at, you know what you have to prove in the latter case, which is harder in the former. Is that something that will just sort itself out in the wash, as we

just get more of these decisions, or is the question of predictability, in other words, the parameters that the CMA will be looking at in order to determine whether a merger is prejudicial to competition or not, something that we ought to bear in mind?

MR HOLMES: My immediate reaction to that is that the purpose of the Act under the test in section 35 is to protect the competitive process within UK markets. So considerations of predictability for those involved in mergers and acquisitions in the market is not the primary consideration. The primary consideration is what are the consequences for competition of the merger, and are they sufficiently significant that the CMA is required to intervene.

What I would accept is your suggestion that the decisional practice gives some guidance, and as further decisions are rendered that guidance may become clearer in particular cases, and the criteria which the CMA applied in assessing this merger make sense in view of its competition concerns and will inform conduct in the market.

Of course, parties who are concerned can seek pre-clearance approval by the CMA if they have concerns.

MR JUSTICE MARCUS SMITH: Thank you.

MR HOLMES: That brings me to the second ground of Meta's application, and this concerns the CMA's assessment of market power. The first limb is a challenge to the CMA's market definition. Meta says this was irrational. Specifically, Meta claims that two findings made in the decision are inconsistent with one another. The first is the finding that Meta competes in a market for display advertising as distinct from search advertising. The second is that GIPHY's Paid Alignment product would be a close substitute for Meta's display advertising, although that product is said to be predominantly

search-based.

We say there is no inconsistency when one looks at what the CMA actually found. The allegation that was made by my learned friend, Mr Jowell, was that the CMA's market definition was based on operational characteristics, if you like, product characteristics, how these products, in fact, work. In my submission, it is Meta's submission which is based on operational features or characteristics of the product, namely the fact that there is a search engine involved in the case both of the Paid Alignment product and search advertising. But the CMA's analysis actually looked at demand substitutability by advertisers in order to understand, first of all, the distinction between search and display and then which of those two GIPHY's product was closer to.

Looking at the decision to make that good, the relevant chapter is obviously chapter 5. Picking it up at page 559, paragraph 5.6, you see the starting point:

"The relevant services provided by the parties. Searchable GIF libraries, social media and display advertising."

What we are concerned with here is the third of those. The discussion of display advertising begins on page 608, paragraph 5.155. You see that paragraph 5.156 differentiates three different types of digital advertising, search, display and classified. It is the first two that are presently relevant.

As explained at (a):

"Search is where advertisers pay online companies to link their company website to a specific search word or phrase so that it appears in a general search engine results."

We have some examples of that, as did Meta. I am not sure that there's a profound

difference between them. If you look at page 3 of the handout, this is a screenshot I think from Google by the look of it. You see the search term in the bar at the top is "iPad". You see the results that are generated. Sponsored links at the top, which you can click through, pictures of iPads, prices and details of the offer, the provider and further details about the product, about the terms on which the product will be supplied. You see free shipping, or in the case of the mobile contract the monthly rate and the length of the contract.

Over the page you see a similar set of results for Coca-Cola. Do you see at the top of the page classic examples of links. As explained at (b), display advertising is where advertisers pay online companies to show their ad on their web pages, pay online companies, publishers, to show an ad on their web content.

An example might be where advertisers pay to show a picture or video promoting their business on an online news portal, such as a national newspaper website. You see an example just taken from The Guardian and there's an advert for the Connaught, which looks like it might be -- I am not sure. Is it a hotel, the Connaught? Yes.

At the bottom of the page, an advert for a hedge fund, from the look of it, or a financial services provider.

These, of course, are not targeted by reference to a particular search which has just been undertaken by the user. They are targeted on other bases than that.

There are also, further on, examples of display ads that would appear on a social media website. So these are just served up in your feed. I think it is Facebook, these examples. They are served up in a feed. You will see they are again promoting particular products, Sephora and other products, that are targeted not by reference to a specific search which has been undertaken, but

by reference to Meta's understanding of what's likely to appeal to a particular user.

Turning on to paragraph 5.157 in the decision, over the page, there is the point that Facebook derives its revenues from display advertising.

At paragraph 1.158, the CMA notes that GIPHY's paid alignment product and describes it there. It involved offering to promote sponsored GIFs in its search results and in its trending feed.

The CMA foreshadows its finding that this type of advertising has similarities to the type of display advertising offered on Facebook platforms, but also some differences.

Turning on to page 610, at paragraph 5.160, the CMA identifies the range of evidence which it evaluated on the availability of substitutes within and outside display advertising. You see that those included the views of advertisers, parties' internal documents and evidence gathered in a market study. That's a reference to a recent study that the CMA undertook of online markets and advertising. So not focused on -- again advertisers and collected views of media agencies that buy ads on behalf of clients, and advertisers buy interviews and a qualitative survey.

So the CMA was not focused only on operational characteristics, as Meta alleged yesterday.

For present purposes, two parts of the CMA's assessment are particularly relevant. First, the CMA's views on whether display and search ads are substitutable by advertisers who are on the demand side of the market. Secondly, the CMA's views on where GIPHY's Paid Alignment product would fit most comfortably in that taxonomy.

Taking those points in turn, the CMA's discussion of the relationship between display

and search begins on page 611, paragraph 5.165. The CMA there notes the conclusion of the market study that there is only limited substitutability between display and search advertising, from the advertiser perspective. You see that all media agencies and most advertisers told the CMA that those types of advertising were not substitutable. That's because they perform different roles. Again, not a focus on operational characteristics, but upon the role for which advertisers purchase particular kinds of advertising inventory.

You see at (a) that search is primarily intent based advertising, designed to provide immediate answers to consumers who have already shown interest in buying the product and are at the end of the purchase journey, that's to say in-market consumers.

So if you search for an iPad or a plumber on Google, the chances are that you are out to buy one, to procure a product or service, and you are served up with links that can take you to a website where you make the purchase.

Then, if you look at point (b), that contrasts with the position of display ads, which are more suitable for raising brand awareness and reaching new audiences that might not yet have shown interest, out of market consumers.

In other words, when an advert is placed on a news portal, it will not be targeted by a reference to a search which the user has just undertaken. It is more likely to be used to promote the general brand or capture the interest of consumers who have not already shown themselves to be in the market for such a product by undertaking a specific search.

This distinction is reflected in the evidence set out at 5.166. Most advertisers said they set budgets for search and display advertising independently and do not allocate them interchangeably. Display advertising is primarily chosen by advertisers with the objective of targeting increased brand awareness for

specific audiences. KPIs for display advertising tend to be focused on the reach achieved with a specific audience group.

In contrast, search advertising is chosen by advertisers with the objective of converting in-market consumers, ie making the sale. Clicks through and then making the sale.

Turning on to page 5.170, you see the conclusion that for most advertisers search and display are not close substitutes.

Then the second question, how GIPHY's product relates to these categories, is discussed on page 614. In paragraph 5.175, in the final sentence, you see the focus of the CMA's enquiry:

"It considered the characteristics of this form of advertising, whether it was closer to display, search or sits between the two."

In paragraph 5.177, the CMA explains that it expects the strongest competitive constraints on Facebook, as a provider of display advertising, will be imposed by providers whose services could meet the same advertiser needs that are fulfilled by Facebook platforms, ie what role is the advertising being used for.

"The type of advertising offered by GIPHY involved increasing the prominence of sponsored contents in the search results. However, the purpose of search in the context of GIFs is different for the typical purpose of search on general search engines, such as Google or Bing. Search advertising on general search engines is presented when users use the engine to look up a product or solution to a problem which they face, for example, someone searching for a gift may consider buying a box of donuts. In contrast, users searching for GIFs are looking for a way of expressing a feeling in messages or other modes of communication with others. For example, a user looking to communicate hunger to a friend may use a GIF featuring donuts.

Furthermore, individuals who receive a GIF sent to or shared with them by others, such as in their message chat, will have the ad displayed to them without having made any search. Therefore, we are of the view that Paid Alignment, at least in its form at the time of the merger, is generally less likely to directly prompt a purchase of the product and more likely to increase the user's brand awareness or affinity. This means that the search term in GIPHY's advertising model merely helps to target the sponsored GIFs to specific audiences, rather than helping to identify an audience which may have an intent to purchase the product behind the sponsored GIF."

So that sets out two reasons why GIPHY's Paid Alignment product is not like search. The first is that you are not looking for a product. No-one goes to GIPHY or searches for a GIF on their WhatsApp in order to find a product or service to buy. We have given an example in the handout, the other handout, the first handout that I showed you earlier of what happens if you type "plumber" into Google, on the one hand, and GIPHY, on the other. In the case of GIPHY you will get a set of amusing little videos that are somehow connected with the subject of plumber. In the case of Google, you will get ads for plumbers relevant to that particular consumer need. So that's one point of distinction.

The second is that the advertising, of course, works in the case of GIPHY not only on the person who does the search, but also on the person who receives the GIF, which embeds the branding. Of course, that person won't have done any search at all. So again for that audience the advertising is not search based at all.

Then, at 5.178, a further point that, of course, brand GIFs are also promoted within the trending field. That appears even more closely aligned to the concept of display advertising. Since users experience these ads displayed to them

without entering any search terms. Whilst the content in GIPHY's trending feed is based, at least in part, upon popular searches, the content is generic and not connected to the searches or intent of each particular user.

PROFESSOR CUBBIN: I am not sure if this is at all relevant, but I have not seen any reference to product placement by influencers and in films and movies and so forth. Did the CMA consider that?

MR HOLMES: I don't know. Just as an immediate reaction, that does seem to be a comparable activity in some ways to the type of Paid Alignment product that GIPHY was involved in, but let me check to see whether this point had been considered. That was not a point that was considered in this case.

The CMA then turns to consider evidence from the parties' internal documents and from advertisers on the demand side. We need not consider that now, I think. But at paragraph 5.180 it is worth noting the evidence in the second sentence:

"The views of advertisers submitted to us also suggest that Paid Alignment primarily serves the purpose of brand awareness, ie reaching out at market consumers."

At paragraph 5.182, the overall conclusion:

"GIPHY's advertising product was novel and did not necessarily fit neatly within any single pre-existing advertising category. However, based on the evidence set out above, we have concluded that 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 that's the analysis in the decision.

Meta says that it was irrational and/or ignored relevant considerations. There is this alleged inconsistency, which turns on the fact that GIPHY is search-based,

and that is said to show that it is in search advertising. But, as I hope is now clear, there's no such inconsistency. The CMA specifically considered and took account of the fact that GIPHY's product was partly search-based, and they explained why it was nonetheless closer to display advertising than general search advertising in its purpose. There was nothing irrational about that and it didn't overlook any relevant considerations.

There's also a complaint made that the CMA did not reach a definitive view as to what this product, this still evolving product, would be in the UK display ad market once it launched.

In my submission, there is nothing to that. The finding of close substitution between the GIPHY product and the Facebook display ad product is sufficient to show why it was that the CMA considered that the cessation of GIPHY's efforts to enter with its Paid Alignment product may be expected to result in a significant lessening of competition in the UK display ad market. So we say that is no irrationality and no lack of relevant considerations.

Ground 2 (b) concerns the CMA's finding of market power on the part of GIPHY in the market for searchable GIF libraries. Meta contends that the CMA was required to consider whether GIPHY had the power to sustain prices above competitive levels or to restrict output or quality below competitive levels. It bases itself upon a passage in the OFT's guideline on assessing market power in the context of behavioural competition law.

For your note, GIPHY's position in the supply of searchable GIF libraries is considered in paragraphs 5.43 to 5.91. It is common ground that this focused on whether there were any effective substitutes for GIPHY's services available to Facebook's rivals. So this was the focus. Both GIPHY's market power in relation to GIF libraries was only relevant to the decision insofar as it informed

the vertical SLC finding, which concerned the ability and incentive of Facebook to engage in input foreclosure after the merger. There is, therefore, no need for the CMA to consider GIPHY's power over price. That was not a relevant consideration for the CMA's reasoning, and it wasn't irrational that the CMA chose not to undertake such an analysis. It wouldn't have had a place in the CMA's chain of reasoning in the report.

In my submission, this limb of the ground is obviously without merit and it should be rejected.

I am reminded of the time, sir. Would this be a convenient time to take a short break? We are well on track.

MR JUSTICE MARCUS SMITH: Yes, indeed. We will rise and resume at a quarter to midday. Thank you.

MR HOLMES: I am grateful.

(Short break)

MR HOLMES: Sir, just one final point on ground 2, if I may. It is just to address the point that is made by Meta that if its display product does compete with Paid Alignment, Meta says it must follow that the CMA's market definition is too narrow and should include other businesses providing search-based advertising, like Google or Bing, one assumes.

I hope that my answer to that is already apparent. The point is that there was clear reasoning and analysis in the decision to explain why the Paid Alignment product was not comparable with those search-based advertising businesses, and it, therefore, doesn't follow that the CMA was required to define a market which included search-based advertising as well as display advertising. There's nothing irrational in the approach that the CMA took. Google's product is just different from GIPHY's, given the purpose for which advertisers

purchase advertising on GIPHY, on the one hand, and on Google or a general search engine, on the other.

So that concludes my submissions on ground 2, unless there are any questions.

The third ground concerns the counterfactual assessment. The Tribunal has seen what the CMA found about that, namely that absent the merger, the most likely counterfactual was that GIPHY would have continued in the supply of GIFs and to develop its products and services to generate revenue and explore options to further monetise its products. For your note, that's in decision paragraph 6.7.

Now, Meta contends that that conclusion does not rationally follow from the CMA's findings of fact, and it maintains that the CMA could only rationally have concluded that, absent the merger, GIPHY would have survived by way of a further funding round from existing or third party investors at a discount from previous valuations, the so-called down round, and on that basis it alleges that the counterfactual wasn't based on sufficient enquiry, because the CMA did not investigate the adverse consequences that would flow for the business from such a down round, in particular in terms of staff retention.

In my submission, there are three main difficulties with that submission. First, the evidence does not support the view that a down round was inevitable.

Secondly, the CMA specifically considered and rejected the adverse consequences that would allegedly flow from a down round, and those conclusions are not in any way irrational.

Thirdly, given the two preceding conclusions, it wasn't irrational that the CMA did not consider further the alleged adverse consequences of a down round.

Taking those points in turn, on the supposed inevitability of a down round, Meta relies on the fact that the investors preferred to pursue the M&A route

following receipt of Meta's initial offer of -- I think this is unconfidential, the amount -- $300 million.

Meta says that the initial offer was below the valuation achieved in the last funding round in 2019, and this shows that any further funding round would have to have been at a lower level than the last funding round.

Now, as regards the evidence as to the position of GIPHY's investors, the material before the CMA suggests that the business was in good shape prior to Covid and the merger offer, that it continued to enjoy investor support, and there was a reasonable basis for the CMA's conclusion as to the prospects of obtaining further investor funding.

Starting with the state of the business, if you turn to paragraph 6.45, on page 637, you see there that the evidence showed that GIPHY was already generating revenue through Paid Alignment and related revenue sharing agreements and that this was on an upward trajectory prior to the merger.

Paragraph 6.46 discusses the evidence as to the 2020 pipeline.

Turning on to 6.47, you see that GIPHY forecasted to close quarter 1, 2020, 100% of its budgeted revenue forecast, without showing the figures, so based on the sales.

As regards the position of investors, the CMA considered a number of items of evidence, and this included contemporaneous views expressed by GIPHY's management. In this connection, the decision records the views expressed in a GIPHY internal document from mid-March 2020 at 6.72.

So if you could just review the first sentence and the confidential text that follows.

PROFESSOR CUBBIN: Sorry. What paragraph is this?

MR HOLMES: 6.72 on page 647. So that was the internal view expressed in a GIPHY document by GIPHY's CEO immediately prior to Meta's offer.

The CMA also examined the position in relation to a number of specific investors. It both spoke to them and looked at what the contemporaneous documents showed. That's set out in the decision starting at 6.74. Beginning with Beta Works, you see from 6.74 that this is a seed stage investor. So it invests right at the beginning. On that basis, the CMA found this particular investor was unlikely itself to invest. But its assessment of the prospects of securing investment is set out in 6.76 and 6.77. If I could just ask you to read that, please. (Pause.)

So a positive assessment of the business and identification of a number of options open to GIPHY at the time when Covid occurred.

Then, at 6.80, another investor is considered. You can see its view of the business at 6.82. If you could review the confidential text there, please. (Pause.)

Now, after the event, at paragraph 6.84, you see what it told the CMA, and that was that it was difficult to estimate the decision it would have made absent the merger in relation to further funding.

The contemporaneous e-mail evidence suggests strong support for the GIPHY business. You see an e-mail from a person at this investor in 6.84 to Alex Chung, GIPHY's CEO, at the end of March 2020. You see the three confidential bullets and the views that are expressed there. You see in particular at (c) the indication of the position this particular person would take in front of their committee at the investors.

A third investor is considered from paragraph 6.86 onwards. I would ask you, please, to note the e-mail from GIPHY to an investor which is quoted at 6.89, again from end of March 2020, which appears to indicate that GIPHY continued to have support from this particular investor, despite the immediate Covid challenges. Do you have that?

A further investor is considered on page 652, starting at paragraph 6.91. You see at 6.92 an e-mail exchange suggesting that the investor appeared positive about GIPHY's monetisation ability in 2020, noting that the revenue plan presented was a baseline only.

Then you see the confidential text and the interpretation that was placed on it by another investor in correspondence with Alex Chung.

CMA's conclusion at 6.107. If you could just review the first two sentences of that, down to the fifth line. You see that the CMA did not consider that the investors would have pulled the plug on the business.

There's a common sense point here. It would be inherently illogical for an investor to take an action that would destroy its own asset. Why would they? In view of the available evidence, the CMA's conclusions in relation to existing investors are clearly not irrational.

Moreover, Meta is incorrect in alleging that the evidence shows any further funding round would necessarily have been a down round. The fact that the investors preferred to explore sale of the business following Meta's offer does not show how they would have responded absent the offer.

The counterfactual enquiry is concerned with a world without the merger, and the fact that they were prepared to entertain discussions with Meta in relation to the sale doesn't show that any funding round, had they proceeded instead by that means, would have been a down round.

Meta's opening offer was not the ultimate valuation achieved in the sale and the CMA specifically considered GIPHY's valuation, starting at 6.154. If you could turn that up. It is on page 668. If you could review that paragraph, please, 6.154.

MR JUSTICE MARCUS SMITH: Yes.

MR HOLMES: Turning on to the following page, you see at 6.155 that the estimated equity value in 2019 is broadly in line with the total consideration paid by Facebook.

So the Meta sale was broadly aligned with the valuation provided to GIPHY by its advisers in the course of 2019, and that does not suggest that the price accepted by GIPHY and its investors was at any substantial discount to that 2019 valuation.

Mr Jowell makes the point that another valuation after the event by the CMA in 6.156 is somewhat above the total consideration. But, as you see from 6.154, subsequent to the D1 round, the business had a valuation in August 2019. So the level of the sale would not have come as any shock or disruption to their understanding of the value of the business, based on what their external advisers were telling them as at June 2019.

So, in my submission, the material on the CMA's file did not point ineluctably to any funding round being at a substantial discount, as Meta alleges.

The third point is that the CMA specifically considered and rejected the adverse consequences that would allegedly flow if a down round did take place.

Furthermore, Meta is wrong to suggest that the CMA failed to consider the consequences that would flow in terms of staff retention in the event of a down round.

The CMA looked at whether a down round would result in the loss of key employees and it identified a number of reasons why it did not consider that consequence would necessarily follow.

You see that at paragraphs 6.102 to 6.105. You can see from the heading above 6.102 that this section specifically deals with staff retention and is addressed to the suggestion that funding would have an impact on that.

Two points are made at 6.105. The first is that the pandemic was causing significant disruption to labour markets. You see that in the sixth line down:

"... with the consequence that it was not clear that GIPHY's employees would have had an incentive to leave GIPHY for other start-ups, which would have been in a similar position to GIPHY."

The second point is that employees would have forfeited their stock options entirely, had they chosen to leave the company.

The CMA was, therefore, not persuaded that employees would have been incentivised to leave GIPHY, absent the merger.

There is clearly a rational basis for that conclusion, and on the basis of it the CMA was not rationally required to conduct any further enquiries as to the consequences of the down round.

Now, my learned friend did not dwell in his submissions yesterday on what enquiries he says the CMA ought to have made. The only enquiries that have ever been identified are enquiries of relevant GIPHY employees as to what the likely effect of a down round would have been for them. For your note, see paragraph 101 of GIPHY's Notice of Appeal, hearing bundle volume 1, tab 1, page 58. But those enquiries would have been highly speculative and there's no reason to think that they would have generated evidence of any probative value. A failure to make those kind of enquiries of individual staff members simply cannot be characterised as irrational.

Subject to questions, those are my submissions.

MR JUSTICE MARCUS SMITH: Thank you very much, Mr Holmes. Much obliged. No questions.

Mr Jowell.

Reply on grounds 1, 2 and 3 by APPLICANT

MR JOWELL: I am grateful. In relation to ground one, in the light of my learned friend's oral submissions, the issue between us has to a large degree I think now crystallised.

Could I invite you to take up page 95 of the transcript from yesterday, where he helpfully -- if you have it. If you don't have it, maybe I can read you the relevant passages. This is what my learned friend said. He said --

MR JUSTICE MARCUS SMITH: One moment, Mr Jowell. We may have one behind us. They have been provided but -- page 95?

MR JOWELL: Yes.

MR JUSTICE MARCUS SMITH: Thank you.

MR JOWELL: At line 10, you see my learned friend said, with admirable clarity:

"Dynamic competition, as 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."

So that is how he puts his case. He says at the bottom of the page that my submission on ground 1 rests on a misconception. He says:

"The metrics identified", so some assessment of market share, potential market share and so on, "would be of relevance if 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."

So that is now the CMA's case. It doesn't turn on GIPHY achieving any particular size on the relevant market it has identified, because its case is that GIPHY's mere presence was already a dynamic competitor, and that, absent the merger, that would have continued, and there would have been an increased chance of newer innovations in the display advertising market. But he accepts, on the other hand, that if the CMA's case had been about what he calls "future competition post-entry", then the metrics that we identify would be relevant.

So, therefore, the issue that is between us really turns on whether the recourse to dynamic competition in this way suffices in general and in particular on the facts of this particular case.

The facts of this particular case, and two particular facts in this case are uncontroversial. The first is that as at the time of the merger GIPHY had no presence whatsoever in the UK and, secondly, that GIPHY was not on Meta's competitive radar, as it were, and did not perceive it as a competitor, and it had not responded to it, even in the market in which it was present in the United States, in any shape or form. So there's no suggestion that as at the date of the merger Meta or anybody else in the United States advertising markets had in any way innovated in response to the presence of GIPHY, even though it had been present on that market for some three years.

Now, we say that the difficulty with this argument is not just that it's irrational, though we do say that as well. The difficulty with this approach is that it runs straight into three constraints that are imposed by the statute. We say it's either a misinterpretation of the statute or, at the very least, a misapplication of the statute. That is an error of law, because what they can't do, with respect, is to invoke this concept of dynamic competition as a means of re-writing the

statute to remove any of the three cardinal constraints that I have already identified in opening.

The first problem with this is that, given that GIPHY simply had no presence in the UK display advertising market, and GIPHY's presence even in the United States was not actually having any effect on the UK display advertising market, one then must ask oneself: "Well, if pre-merger GIPHY is said to be a dynamic competitor, on what market was it a dynamic competitor?" The only answer to that can be the United States, a market in the United States. One can't have it being a competitor untethered to any particular market.

The difficulty with that is that it is irrelevant, from the point of view of the statute, that GIPHY was or might have been a substantial competitor in the United States advertising market.

The statute does not say that an SLC arises when there's a substantial lessening of competition in the United States. It does not state that an SLC arises when there is a substantial lessening of beneficial effects in the United Kingdom from competition in the United States. It does not say that one can rely on adverse effects in the United Kingdom from a substantial lessening of competition on a non-UK market.

It does say that there must be a substantial lessening of competition on the UK market, and that has, in our submission, real meaning.

The second difficulty for my friend's case, as it is now clarified, is that the United States' markets have never been properly analysed. They have not even sought to engage in a market definition process for the United States advertising markets.

It cannot just be assumed that the same distinctions between display advertising and search advertising apply in the United States. Nor can it just be assumed that

GIPHY's presence in the United States advertising market, which is a truly enormous market, whether GIPHY's presence would plausibly have stimulated innovation on that market, because they simply have not engaged in the necessary analysis to make that assertion. Nor is the CMA, with respect, best qualified to analyse the United States' advertising markets.

Now, the other difficulty that they run into in the statute is that they are ignoring the requirement that there must be a substantial lessening of competition on the balance of probabilities. It is not enough to pass that test on the basis of the current statute to say that there is a material increase in the likelihood of new innovations or products from a particular source.

What is required is an assessment that, on the balance of probabilities, there would have been significant new innovations or significant new products.

Even if you constitute the form of competition as being new products rather than, say, declining prices or other things, you do have to show that there is a balance of probabilities likelihood that there would be new products and that they would be significant.

One can actually see both of these problems when one comes to paragraph 7.168 of the report, if one goes back to it. My learned friend showed you. That's page 731. What one sees in this paragraph is reference, first of all, to -- we see in the last sentence:

"As such, whilst the likelihood of successful expansion by GIPHY was necessarily uncertain at the time of the merger, our view is that its ongoing efforts to innovate and expand would have driven dynamic competition in the display advertising market."

But we are not told which display advertising market. We see above that, they say:

"We consider that GIPHY's success to date to monetise GIFs materially increased

the likelihood of new innovation products being made available in display advertising."

Well, the test is that on the balance of probabilities there will be a substantial lessening of competition. It is not that there is a material likelihood of additional competition: A material increase in likelihood does not meet the current statutory test.

If one goes to 7.170, one sees that it does appear that what they are, in fact, relying upon is the likely future innovation that would occur in the United States. You see that in 7.170:

"As noted in paragraph 7.12, the competitive process over innovation and the development of products by global players, such as GIPHY and Facebook, takes place at a global level, whilst sales to customers occur at a national level."

So effectively it seems -- if one goes further down to 7.182, one sees it perhaps even more clearly on page 739. They say:

"In addition, we note that the importance of GIPHY to the dynamic competitive process includes any innovation or efforts by incumbent firms made in response to GIPHY, and these would not necessarily be limited to the US 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 US, would potentially also benefit UK consumers."

So the report is not really, it seems to us, relying on a greater likelihood of innovation in the UK market. It is relying on a greater likelihood of innovation in the US market, which might then have extended to products sold outside of the US, including in the UK, and might, therefore, have benefitted UK consumers. But

that, as I have said repeatedly, is not what the statute enables them to look at, and for very good reasons. The CMA is not properly a regulator of competition or innovation in the United States' market.

That essentially is the end of the horizontal SLC, as found in this decision. The Tribunal should put paid to this notion that the CMA has got free rein to simply ban any international merger simply because it may have an effect on innovation on an overseas market that may have benefits in this market.

If I could then briefly take you through some of the authorities that my learned friend took you to, the first is the South Yorkshire authority, which I would like to just go back to very briefly, because, of course, it is House of Lords, and on a key element of the statutory test. That is in the bundle at tab 25.

MR SIMON HOLMES: Is that volume 2?

MR JOWELL: It is volume 1 of the authorities bundle.

Now, of course, this is dealing with the requirement of a substantial part of the United Kingdom, but as you have seen in the Global Radio case, the same approach to "substantial" has been held to apply also to "substantial lessening of competition".

My learned friend seemed to be suggesting that the thrust of this case was that the CMA had complete free rein over its application of the concept of substantiality. That is not the case when one reads this judgment closely, first, because, as I have already shown, it very clearly makes clear that "substantial" does not mean simply more than de minimis or more than trifling, let alone something less than de minimis. It does indicate that there must be a significant effect. But also, when one reads it, there are two further points that emerge.

The first is that Lord Mustill and the House of Lords were prepared to look not just at

what the Commission in that case said, as it were, but also what they did in deciding whether they were applying the proper approach to "substantial".

When I say "what they did", I mean they were prepared to have a close look at the analysis in the case, to see how they were really approaching the criterion of substantiality, rather than one or two phrases taken out of context.

That must cut both ways, because we say that if one looks at the report, and one forms a view of it as a whole, one is entitled to look also to see whether are they really just saying that even a de minimis effect suffices?

The task of the Tribunal is not sufficient that there is a sentence in the report that says: "Well, we think that this would lead to important dynamic competition" in a very vague way. One has to look at what they are actually basing that on and look at it as a matter of substance to see whether the substantiality requirement is made out.

The second point I would just observe is at the bottom of page 578, where they are prepared to look at what sort of things the Commission must do in order to consider substantiality. You see at the bottom, in the last paragraph:

"Accordingly, although I readily accept that the Commission can and indeed should take into account the relative proportions of the area by comparison with the United Kingdom as a whole, as regards surface area, population, economic activities, and it may be in some cases other factors as well, when reaching a conclusion on jurisdiction, neither of them on its own, nor all of them together can lead directly to the answer."

So there are certain factors there that they are treating as effectively mandatory considerations in the context of "substantial part of the United Kingdom", and those include relative proportions of the area by comparison with the UK as a whole, as regards a number of parameters.

So it is clear that in the context of a substantial part of the UK, if you like, this is the equivalent of a sort of market share type of analysis, and the House of Lords is making clear that that is necessary, and certain further enquiries may be desirable, but those at least are necessary.

So it's not the case that, read as a whole, this judgment is suggesting in any sense that there is a sort of free for all when it comes to the criterion of substantiality.

The other judgment my learned friend took you to that I would like to go back to is the Toby judgment. That's in volume 4 of the authorities at tab 86. My learned friend took you to page 3076. He observed that in that case the CMA and the Tribunal were prepared to look at non-price concerns, such as a reduced range of products being offered, reduced levels of customer service or fewer new products being developed. They say:

"Even if it were the case that any price increases would be de minimis, Toby has not shown that the CMA's conclusion as regards non-price effects was unreasonable or irrational."

It is very important, however, to read that in its proper context, and we would never seek to suggest that one can't have substantial non-price effects.

If one goes back, to start with, to 2965 in the judgment, one sees at paragraph 99 that the CMA had estimated that there were substantial market share increments in that case:

"CMA estimated market shares in dedicated AAC solutions. It concluded that the merged entity would have a market share of between 60 to 70% by value, with an increment of 10 to 20% and between 50 to 70% by volume and an increment of 10 to 30%."

Now, there's been no similar enquiry in this case on market shares. More profoundly, if I could please hand up the underlying report, which one needs

to look at to see what they were talking about when it comes to the actual non-price effects, if I could invite you, please -- perhaps if you just read 6.61 and 6.62.

MR JUSTICE MARCUS SMITH: Yes. (Pause.)

MR JOWELL: Forgive me. Also 6.63. So what one sees is there are concrete findings of a positive likelihood of very clear, non-price effects that were, as they say, about to materialise when the CMA initiated its investigation. This was not hypothetical speculation or increase in likelihood or anything like that. This was very concrete and very well-defined, very clearly defined indeed.

So it couldn't really have been a starker contrast to the position in our case, where no effort has been made at all to estimate prospective market share whatsoever, and they just rely on an increasing prospect of a greater likelihood of future innovations, which are completely unidentified and unsubstantiated, and which have not emerged, and which there is no evidence that they have emerged in the only market in which GIPHY has been present for three years.

I want to say something more, if I may, about the -- if I can put it this way, "it could be a Google" possibility, which the Tribunal has raised on a number of occasions.

Now, it is right to say that my learned friend took you to one possible suggestion in the report to that effect, which is 6.114 on page 658. I'd like to just go back to that just to scotch that idea. That is the quote -- I think I can now say it openly, because there's a cross by it:

"Playtika speculated that with a high number of active users and large search volume, combined with proposed monetisation efforts, GIPHY could potentially become a $10 to 20 billion business."

Now, two points about that. First of all, it is in terms speculation. Secondly, one

needs to see what is in paragraph 6.116. Playtika did not perform any due diligence on GIPHY. So it is completely uninformed speculation. To be fair to the CMA, even in its irrepressibly optimistic report it does not come anywhere near to suggesting that it would be plausible to suppose that it would be a business of that sort of magnitude in any reasonable time.

The reason it doesn't is because there are certain inherent limitations on the business that are recognised in the report.

The first point is this. Eyeballs. There are many eyeballs on GIPHY's GIFs but there aren't that many proper users, properly so-called, of GIPHY GIFs, because, first of all, one needs to see whose users these really are. If one goes to the report at 527, one sees the figures there for the estimates -- Table 1.

MR JUSTICE MARCUS SMITH: Page 527?

MR JOWELL: Page 527, forgive me.

MR SIMON HOLMES: Paragraph?

MR JOWELL: It is Table 1 on page 527.

MR JUSTICE MARCUS SMITH: Paragraph 3.45.

MR JOWELL: Forgive me. Paragraph 3.45. Underneath paragraph 3.45 we have Table 1, which give CMA's estimates of shares in the supply of apps or websites that allow UK users to search for and share GIFs. You see the percentage there of GIFs that are run on GIPHY's own website, its O&O website. It is very small. You see the share that one has for Meta and for other companies.

So the O&O channel, the GIPHY website, interesting and fun as it may be to use, as my learned friend suggested, is actually a tiny proportion of GIFs.

When they come to the competitive assessment, the CMA is really entirely focused on the supply of searchable GIF libraries to third party platforms, and although

the supply of GIFs to users direct is included, it is a small proportion and it's effectively ignored.

I can show you that if you look at 5.35 to 5.37 of the report, which is on page 566. You see at 5.35:

"We found that GIPHY's O&O traffic volume, while large in absolute terms, volume of search is very small compared to its API/SDK volume."

They say:

"Our competitive assessment is focused on the supply of searchable GIF libraries through API/SDK third party platforms and through O&O directly to users."

It is clear that the vast majority are through other platforms, in particular Meta's platforms.

If you go on to 5.43, they say:

"Our competitive assessment and related analysis of market power therefore focused on API/SDK distribution of GIFs, which accounts for the vast majority of GIF distribution by volume."

That is followed through in 5.44.

You see it further if one goes to 7.88 in the report, at page 705. Where we see it is confidential but you will see the very small estimated revenues from O&O, which were not achieved in 2019. So it is not plausible to say they were going to monetise through their own website, in very simple terms.

The report, insofar as it has got confidence in the GIPHY business model, it is not based on monetising to its own website. It is premised on some kind of revenue share.

Here the difficulty is of with whom they would have to have made those revenue share agreements. Again, we can see a useful table. Under paragraph 4.43 you see figure 10. You see the GIPHY's third party search volume globally.

Shares by API partner. You can see that in the period up to the merger, in 2020, the Meta family of applications, which are the dark blue for Facebook, the purple for Instagram and the green for WhatsApp, consistently accounted for over half of GIPHY's third party traffic. A small amount in yellow was also accounted for by Snap, Snapchat.

My learned friend sought to suggest that the fact they had managed to have revenue agreements with Samsung and others, and Kika, was a matter of great significance, but it is a smallish minority of the platforms on which they distribute. The majority are Facebook and Snap.

MR JUSTICE MARCUS SMITH: Do we have the same figures in absolute terms rather than just percentage terms? In other words, is the search volume increasing over time?

MR JOWELL: I think somebody behind me --

MR JUSTICE MARCUS SMITH: If it is not in the report I don't want to know but if it is --

MR HOLMES: I think figure 9 may assist, which shows global monthly searches of GIFs both by operator and across market.

MR JUSTICE MARCUS SMITH: 2020.

MR HOLMES: It only shows the position in 2020.

MR JUSTICE MARCUS SMITH: That's the best figure to have.

MR HOLMES: You see at figure 8 GIPHY global contents, GIFs and stickers from 2015 to 2019. That shows the growth. Figure 7 also.

MR JUSTICE MARCUS SMITH: Yes, I see. Thank you.

MR JOWELL: What was required, therefore, to make this work were revenue share agreements, so that one could have permissioned use of the advertising. The difficulty for GIPHY was always that it was far from guaranteed that it would

obtain these revenue share agreements. Indeed, even if it had obtained them, of course, it would still be sharing revenue with Meta. So in a sense this is what is so paradoxical about the objections to this merger, is that not only was it not a competitor, but they could only ever do business together.

If one goes to the evidence on this, you will see it starts I think with Appendix F. If we go to page 1001, one sees the CMA's conclusion on this, which is they say:

"As regards the prospect of entering a revenue share agreement ..."

MR JUSTICE MARCUS SMITH: Which paragraph are you reading from, Mr Jowell?

MR JOWELL: Forgive me. This is paragraph 35 on page 1001. The CMA says:

"The prospect of entering a revenue share agreement with Facebook or Instagram, the evidence is mixed."

Well, that's one way of putting it. If one goes back to page 998, one sees the latest on this from Meta at paragraph 26:

"In February 2020 these discussions" -- this is about a revenue share -- "were continued. Alex Chung asked Vishal Shah whether he would be open to GIPHY selling ads on Instagram in future."

MR JUSTICE MARCUS SMITH: Mr Jowell, this is coloured --

MR JOWELL: Forgive me. I will stop there. Fortunately, I don't think I have said anything confidential.

MR JUSTICE MARCUS SMITH: No.

PROFESSOR CUBBIN: Sorry. What page are we on? I just had a slight accident.

MR JUSTICE MARCUS SMITH: 998.

MR JOWELL: This is the hazard of these lever arch files. Paragraph 26 on page 998.

So if one then goes back into the main report at 705, page 705, they say:

"We consider that securing revenue share agreements with larger platforms, such as Facebook and Snap, was a challenge for GIPHY."

So there is not, we say, a rational basis for saying with any confidence that they would have obtained these revenue share agreements with the major platforms, and that obviously is a major problem for them and for the business.

There were other problems for the business as well. For example, in 7.134, the CMA refers to the problems they had hiring a revenue team. They were still searching for a chief revenue officer in March 2020. So there are a number of intrinsic obstacles to the success of this particular business, which, despite its, as I said, irrepressible optimism, even the CMA is forced to recognise and, of course, the market itself recognised it, because that's why we see that no-one else was prepared to bid for GIPHY, and there's no evidence that anyone in the market who was shown this company by JP Morgan saw any value in the Paid Alignment side of the business, literally none of them.

So that's the reality, and that's why it is implausible to say that this was a future Google. One can posit it might have grown, but this is not a sort of 5% chance of this company knocking things out of the ground.

What one can't, in our respectful submission, say consistently with the Act is that, as I have said, that the mere increasing likelihood of some form of innovation is sufficient to meet the statutory test. There has to be a substantial lessening of competition on the balance of probabilities.

MR JUSTICE MARCUS SMITH: Pausing there, Mr Jowell, I think what you are saying, and I will articulate it so that you can tell me how wrong I am, is that Meta's position on this review is not that you can't have a dynamic assessment of an acquired entity in a merger, on the basis that the acquired

entity is going to be a Google, and one could, perfectly properly, as a regulator, take the view that a merger should be disallowed on that basis, but that assessment in the round has to be established on the balance of probabilities, and although the balance of probabilities may not necessarily require the sort of metrics that one would get on what I call the static analysis, market shares, you do have to have a series of propositions which justify the Google label.

Now, I appreciate not every entity is going to be a Google. We are using a shorthand here. But what you are saying is that the dynamic elements of the assessment have got to be laid out so that a reader can say: "Well, I may not necessarily agree with all of the steps, but I can see how they link together, such that I can reach a conclusion that, on the balance of probabilities, there is a justification for that conclusion." Viewed in that way, the dynamic element is established to the requisite standard.

What one can't do is simply jump from: "We assess things on a dynamics basis" to the end point saying "this is a dynamic case". You need to have in the decision the steps of the reasoning, assessed to that standard.

MR JOWELL: Yes, indeed. I think one can go a little bit further than that. One can say that there are, if you like, two aspects to the dynamic competition. One is that the CMA are keen on breaking it down in this way, content to do so. One is the reaction from the incumbent or incumbents on the market, and the other is the contribution of the company itself. The competition can come in one of those two ways.

Now, the Google possibility really comes into the analysis, in our submission, when you are talking about the reaction. This is what one draws also from the merger guidelines, is that what they are really saying is a less than evens

chance of a massive downside to your profits, basically, can cause you as an incumbent to react in a different way than you would otherwise. That may be through lowering prices or increasing quality of goods or it may be innovation. So that can occur. But for that to occur you do need to make some forward assessments of what the likelihood is of success and how likely that success would be of the challenger, because the incumbent is not going to react to a tiny probability of a tiny competitor, effectively, which is really what one has in this case. There's simply no evidence it would be anything other than that in the UK.

So that's where, if you like, one then applies the balance of probabilities to say: Would the incumbent be likely, on a balance of probabilities, to respond? That depends on two things. One is the likelihood of it being successful and the other is how successful it would be, if it were to be successful. The likelihood of success does not have to be "We accept more than 50%" if it is the case that the product would be of sufficient magnitude, of sufficient importance that it could cause enormous harm to the incumbent.

The other way to look at it then is to say from the point of view of the entrant. Now, the entrant's effect on competition, if one is not talking about a response but only talking about the entrant itself, then one does have to say, in our submission, simply it must be established, on the balance of probabilities, that it would be successful and it would be successful to a substantial extent, because if you are not taking into account the reaction, and you are only looking at the potential competitor, that still needs to be established in the ordinary way, on the current construction of the Act, on the balance of probabilities, and to a substantial extent.

The fundamental problem with the decision is that, as my learned friend says, they

take the approach that as long as they affix the label "dynamic" to the competition, then they don't have to assess either the extent of success or even really the likelihood of success. That just drives a coach and horses through the statute.

I see I have got to 1 o'clock. I have not got on to grounds 2 and 3. Would that be a convenient moment? I have, subject to any questions you may have, concluded on ground 1.

MR JUSTICE MARCUS SMITH: Yes. Just one clarification then on ground 1. I mean, what you are saying about incumbent reaction is one factor which assists in reaching a conclusion on this question. It is not an essential factor to have. It is something which you take into account, whether it is either present or absent. If absent, then, of course, you would need other material in order to make good that absence.

MR JOWELL: Well, there are two ways in which one can look at the incumbent's reaction. I think the way you are looking at it, Mr Chairman, is to say reaction to date of the actual incumbent. It is clearly highly relevant evidence. If you don't have it, then you have to find some other basis to say that they would have reacted in the future. It's not enough to say, as they do in the report, there would be incentives on them to respond if the product got to a particular scale. You know, if GIPHY is selling, say, $2 million of advertising in the United Kingdom, it is not going to stimulate Meta, or indeed anyone else, to develop a new product. I mean, that only needs to be stated to be recognised.

So one does have to have, as I say, a certain -- if you are not going to do it on the basis of the internal documents, because it is not recognised as a threat, in our submission, you then have to look into the future, look into what is

expected to occur, which is what the statute requires you to do, and consider whether the new entrant would be likely to obtain a sufficient scale, within a reasonable time, to stimulate the incumbent, whether they recognise them as a competitor at the moment or not. But the CMA just simply, as my learned friend rightly concedes, they have not sought to make that evaluation in the report.

MR JUSTICE MARCUS SMITH: Thank you, Mr Jowell. Just to make good on our promise of yesterday, regarding the extent to which we want submissions on, as it were, remediation.

MR JOWELL: Yes.

MR JUSTICE MARCUS SMITH: We gave a fairly clear indication that we would not require submissions on that, and that we will draft our ruling accordingly, so that we can leave that matter over to probably a further hearing, in light of our judgment. I think it is appropriate we make clear that is what we will do.

MR JOWELL: I am very grateful for that indication. It will save a good deal of time.

MR JUSTICE MARCUS SMITH: It will save a good deal of time and I think it will assist both you and us in clarity as to what this hearing is intended to do. I think the moment one starts trying to work out what we might decide at the end of the judgment and what, therefore, you need to make submissions on, given the multiple permutations that exist, it is just a recipe for disaster. So we confirm the provisional indication we made yesterday.

MR JOWELL: I am very grateful.

MR JUSTICE MARCUS SMITH: Hopefully that helps. Do you want us to start at 1.45 again?

MR JOWELL: That would be helpful, if possible, to make sure we remain on track, if you don't mind.

MR JUSTICE MARCUS SMITH: 1.45.

MR JOWELL: Thank you very much.

(1.05 pm)

(Lunch break)

(1.45 pm)

MR JUSTICE MARCUS SMITH: Mr Jowell.

MR JOWELL: Thank you, Mr Chairman.

Gowned 2. My learned friend simply did not squarely address the true basis of our challenge on this ground. He addressed a rather different challenge that we might have made, but didn't, to the straightforward distinction between search and display advertising.

Our challenge is based upon an inconsistency in the report and indeed an inconsistency in the approach that the CMA seeks to continue to take in its definition of the various advertising markets, because, on the one hand, what is very clear is that the definition in the report that is adopted, and I have taken you to it already, in 5.156 of the report, is a purely functional or operational distinction based upon the superficial characteristics of the way in which the two types of advertising arise.

The market is not divided on a substantive basis between advertising that is aimed at in market consumers and those that are out of market. Rather, what is said and what is alleged is that the operational, functional characteristics correlate with those underlying features. That of course was a matter that was profoundly in dispute, that correlation.

If I could just show you that. You will see on page 618, for example -- I showed you already on 609 the parties took issue, strongly disagreed with the conclusions that display advertising correlates to out of market purchases and that search

advertising is relevant for targeting consumers with an intent to purchase.

You see on page 612, at footnote 467, it is acknowledged that some advertisers and media agencies responding to the CMA's questionnaire noticed that "search" can also sometimes be used as an upper funnel to build brands, and "display" can sometimes be an effective sales driver.

One advertiser stated that as budgets for search advertising continued to increase, this allows the advertiser to target a higher level of generic key words, and therefore move further up the purchase funnel.

Another advertiser stated that "search" and "display" can sometimes be substitutable, depending on campaign objectives.

So there was evidence to support the parties' arguments that was before the CMA and was referred to in the market study.

That's the context against which one then comes to the consideration of GIPHY's own advertising product, the Paid Alignment. We have never submitted that GIPHY's Paid Alignment Advertising is search advertising, as defined by the CMA. That's not part of our case. Our case is that it is clearly not. It is clearly not display advertising and no amount of twisting the words in the definition in 5.156 can make it display advertising.

Now, the CMA concluded that it was closer to advertising that it believed to be correlated to display advertising. So, effectively, for building brand awareness, but it was clearly not display advertising. Therefore, if the CMA was going to say that it was competing in the same market as Meta, it had to logically admit and accept that its definition of display advertising was incorrect, because it was incomplete, because it did not include advertising of the Paid Alignment type that GIPHY provided.

That's the essence of our point, and we don't seek to challenge the findings in the

report that say that GIPHY's Paid Alignment Advertising was a close competitor or a close substitute to display advertising. What we say is: "Well, you must then draw the only logical consequence of that, which is that it is part of the same market and then you must redefine your market".

We say that if you had done that, then that would have led the CMA to a proper reconsideration of the proper delineations of those markets. We accept we can't say where it would have led them. It might have led them to say there is actually just one advertising market. It might have caused them to abandon their operational functional distinction and adopt one that's based upon the purpose of the advertising, but again you would still have then seen the lines in the market drawn in different places and potentially, therefore, very different outcomes on market share.

MR JUSTICE MARCUS SMITH: If I may say so, Mr Jowell, your attack on this ground is one which has particular attraction in a judicial review rather than in an on the merits situation, because what you are saying is: "Look, you could have, but you haven't, defined the market in a particular way".

MR JOWELL: Yes.

MR JUSTICE MARCUS SMITH: "We say that the way you have defined the market is essentially inconsistent and you are playing with apples and oranges".

MR JOWELL: Indeed.

MR JUSTICE MARCUS SMITH: You are not saying there is not a sensible way of doing this.

MR JOWELL: No, indeed.

MR JUSTICE MARCUS SMITH: What you are saying is that if one did it, let us say, hypothetically speaking, in a broader market definition of just online advertising, or something like that, you would then have to factor in that

Meta's market share would fall --

MR JOWELL: Indeed.

MR JUSTICE MARCUS SMITH: -- and you would have to take the view that GIPHY's share would move from the very, very small to a number of additional very's, but if you reached the conclusion that there was a significant (inaudible) competition on that basis, fine, you deal with it in that way. It is in a sense a very clear articulation on the difference between an on the merits test, which we are not concerned with, and simply that you are saying there's a problem in the reasoning process. You don't -- I am sure you do -- but you don't forensically care whether there is a right answer out there. It is simply that the answer that has been reached is not defensible in terms of its process.

MR JOWELL: Indeed. Really, the way that the CMA have sought to deal with it on each occasion is simply to try to mischaracterise our argument. All advocates do that to an extent. We all are guilty of that to a degree. But there is oversimplifying and there is completely misstating the argument. The problem with completely misstating it is you don't address it. I think my learned friend sought to address it right at the tail end of his submissions, but it really didn't really meet the point. You simply can't, in something that's as fundamental as the question of whether they are even going to be competing in the same market, when you're considering horizontal SLC, particularly on as tendentious or at least tenuous a basis as this horizontal SLC, you can't duck the question whether they are in the same market or not, and you can't get away with it by simply making findings that are only consistent with that conclusion but then not following those through to the other aspects of your reasoning.

That's all we say about that. We say the point has simply not been properly addressed by the CMA.

On the other aspect of ground 2 (b), I didn't address you on that orally. I am not going to seek to say any anything further about it, save that my learned friend concedes that market power, insofar as it is applied to GIPHY, is used not in a sense of power over price. They are only concerned in that context with the inability of downstream rivals to switch to a range of effective alternative suppliers, so as to mitigate any harm from foreclosure.

So they make that concession. It is not market power in the proper sense. That does have implications, of course, because when it comes to the points that I will be coming on to momentarily, as to the existence of a new alternative supplier, or potential development of an alternative supplier, because then that becomes absolutely critical to the assessment of market power of the merged entity to engage in any kind of foreclosure. That's why the purchase of Gfycat by Snap we say is so critical to the analysis, and why withholding that information was so clearly unfair.

May I come next then to ground 3? My learned friend contests that it was inevitable that there would have been a down round, and to do that he cherrypicks from the CMA's cherrypicking to find all the messages of support that at one time or another were given by the investors to those in the business of GIPHY.

The problem with the analysis is that principally he looks at passages that took place before the Coronavirus epidemic, but the fact is the Coronavirus epidemic did happen. It was a reality and it would have been there in the counterfactual as well.

When one looks at the evidence as a whole, and I do invite you to read effectively appendix E in its entirety, we do say that there could be no rational basis for

supposing that the investors would have invested at the level of the early 2019 previous round of investment.

Just to clear up the question of what that level was, my learned friend took you to page 668, and he sought to say: "We are not concerned with the figure that is attributed to that fundraising by the CMA in 6.156." he sought to suggest that it was a lower figure in paragraph 6.154.

What I would invite you to read, please, is footnote 780, which explains what that figure was doing. (Pause.)

It was seeking to assess fair market value as at June 2019. I think I can say that without revealing any confidential information. That is a completely different exercise to the question of what was the valuation of the company at the actual previous investment round. That is what Professor Gompers' focus is on and what he means by a down round. It's a round of equity fundraising that is at a level that is significantly lower than the previous round of equity fundraising.

If one goes in the report back to the evidence, if I may, and I do appreciate this is a judicial review and there is an extent to which one cannot second-guess judgments. Nonetheless, there comes a point where they are so distant from the actual evidence that they simply become insupportable, rationally insupportable.

I have shown you already paragraph 54, where one saw what the actual investor appetite was for a valuation at a level substantially below the 2019 level. Could I then show you what happened a little after that, which you will see at page 983? You see what the contemporaneous April 2020 GIPHY Board pack says. Could I invite you to read paragraph 60, please? (Pause.) So we see where they are.

Then you will see in paragraph 61 that Glynn Capital spoke to Alex Chung on 17th April. They say Alex Chung commented as follows. You note he talks about the impact of the Coronavirus, the commercial deals, which refers to the possible sale to Facebook or Snap.

Then, if I could invite you to please read on 985 (c), "Fundraising".

MR JUSTICE MARCUS SMITH: Sorry, which paragraph is that?

MR JOWELL: Paragraph 61 (c) on fundraising.

MR JUSTICE MARCUS SMITH: I am grateful.

MR JOWELL: This is what Glynn Capital are reporting Alex Chung, the CEO of GIPHY, told them on 17th April 2020.

I draw particular attention to the penultimate sentence, the one starting "Alex Chung", ending in the word "half".

You then see the Sofina Board at 62. You will see what is said in sub-paragraph (b). You see what is in 63 (a). I would invite you to read also 64 to 66 to see the reactions of investors. (Pause.)

Now, we simply say this. The CMA is entitled to take a rose-tinted view of GIPHY's prospects. It is entitled to a margin of appreciation. But simply when it comes to its conclusion at 67 to 70, it doesn't expressly deal with the issue of at what level of valuation of the company would they have invested in. We simply say that the notion that, given the evidence you see in the run-up to that period, the notion that they would have invested at a valuation that I have shown you in early 2019 could only have been made -- and I don't say this slightly -- by a regulator that had taken leave of it senses. It is just simply not a rational conclusion that's open to them on that evidence. You can conclude that they would have invested, but to conclude they would have invested at that level is completely irrational.

So that brings me to the end of my submissions on grounds 1 to 3.

I am going to now move on, if I may, to the procedural grounds. It may be that Mr Holmes wishes to depart at this point. I don't know.

MR JUSTICE MARCUS SMITH: Mr Holmes, only if it is convenient to you.

MR HOLMES: I am grateful, sir. I will, if I may, slip out now. Thank you.

MR JUSTICE MARCUS SMITH: Thank you very much for your very considerable assistance. We are very grateful, and safe journey.

MR HOLMES: I am grateful.

Submissions on grounds 4 and 4A by APPLICANT

MR JOWELL: Grounds 4 and 4A are concerned with the procedural flaws. May I start by giving an overview?

The procedural flaws can be grouped into three main categories. First, there is the failure properly to consult. Under the statute, there is an express duty to consult on a proposed adverse decision, but, as I will come on to, there's also a wider duty of fairness that applies throughout the investigation process.

There are a number of matters about which we say there was a failure to consult. Information that was highly and obviously relevant to the evaluation of the merger was withheld, and the matters were relevant both to whether there were SLCs at all but also, and particularly, to how long any vertical SLC would be liable to persist, and hence to the appropriate remedy for the vertical SLC.

Now, one of the pieces of information consisted in the bare fact that Snap had purchased Gfycat, and that was withheld for 14 months of the investigation, but there was also the important further information that because we are in public session I will just call the additional Snap/Gfycat information. The CMA learned of this information in June 2020. For reasons that have never properly been explained, it only revealed some of that information, the bare

fact of the purchase of Gfycat by Snap, on 25th August 2021.

What's worse, is that this vital additional information was not provided until after the decision was published, when we finally received an unredacted version of the decision, and I think it may safely be said that it is common ground that it is too late to consult after the decision has been published.

We say this information was disclosed too late and so partially that Meta was materially disadvantaged from making effective and timely representations to the group responsible for the decision or that should have been responsible for the decision, and therefore Meta was not in a position properly and fairly to fully formulate its responses to the issues likely adversely to affect it.

I should stress that the Gyfcat/Snap instance is not the only aspect of the failure to consult. I will come back to several other pieces of information that were withheld from the consultation process.

So that's the first main complaint we have. The second main procedural complaint concerns the extensive excisions that were made to the report. It is important to highlight two features about these excisions. The first is their sheer volume. We are not talking about one or two proper names being omitted, as was the case, for example, in the Ryanair decision. When in January of this year, after we lodged our application, the external lawyers to Meta were finally given access to the redacted passages, we discovered that there were in total 9,262 words or, in other words, the equivalent of 24 pages of the decision that had been excised, and there were 288 footnotes whose existence we could not even tell had been removed because of renumbering in the decision. So this was excision on a grand scale.

The result is that whole paragraphs were excised, without any explanation of their contents. A number of passages were rendered incomprehensible or their

meaning distorted or unclear.

The other feature about the nature of these excisions is that they were applied in certain cases to reasons for the decision, and in several cases to information necessary to understand those reasons. Again, the true extent of this only became apparent once we saw the material in January of this year.

In particular, the excisions relate to quite a wide array of information and evidence relevant to the counterfactual which we have just considered. They also relate to information that was relevant to rivalry enhancing efficiencies that might have affected the horizontal SLC, and also information relevant to the existence and duration of the vertical SLC.

There is an overlap here with the failure to consult, because a number of these matters that were excised are also matters of which we say there was a failure to consult. We say this sort of use of excision that obscures reasoning or information necessary to understand the reasoning in the decision, particularly to persons who are affected, directly affected by the decision, is contrary to statute and it also amounts to failure to give reasons.

The other feature of these excisions about which we make complaint is who made them or who decided on them. They were not decided on by the group. Since, as I have come on to it, it is the responsibility of the group to decide on the report containing the matters that are identified in section 38(2) of the Enterprise Act, which I will come on to show you, they were not properly made for that reason as well.

The group we say cannot delegate the function of deciding on which parts of its reasoning and facilitative information is to be excluded from the report.

This brings me to the third procedural failing, which is our ground 4A. This failing has emerged late in the day, but that doesn't in any way diminish its

significance. We say it is fatal to the validity of the decision. Indeed, it means on proper analysis we say that no decision at all was ever taken.

As I will show you shortly, section 34 (c) (i) of the Enterprise Act entrusts the preparation and publication of the report to an independent panel, the group. The report must contain three things: the decision, the reasons for the decisions and the facilitative information for that reasoning and for those decisions.

The function of preparing and publishing a report containing those three things is under the statute to be carried out on behalf of the CMA by the group. We say that it is intrinsic to the task of preparing and publishing a report that the group and no-one else must approve its contents. The group cannot hand over or delegate the task of deciding some of the report's contents to someone else, to a third party, and that includes to the Chairman of the group or staff members of the CMA.

On any view, we say that inability to delegate must apply to the decisions in the report, to the reasons for those decisions in the report and to the information that the group considers facilitates the understanding of those reasons and the decision.

We say, in our Notice of Application, it is a fundamental principle of administrative law that a statutory power of decision-making must be exercised personally by the persons on whom the power has been conferred, unless they have been expressly empowered to delegate it to someone else.

We accept that provisional drafts of the report were approved by the group, but it appears from the minutes of the relevant meetings that the group thought that thereafter they were entitled to delegate authority to Mr McIntosh, the Chairman, to make further minor changes to the report, and they purported to

do so in their minutes.

In law we say it is clear that they were not entitled to delegate in that way, and it seems that indeed some changes to the draft report were made by CMA staff members, and it appears that some of them were approved by Mr McIntosh. Some -- we do not know which -- were possibly not approved by Mr McIntosh, but the point for present purposes is that none of them were approved by the group.

The result I am afraid, and it is unavoidable, is that the group cannot be said to have prepared and published the report that was published.

Now, we acknowledge that if the subsequent changes truly had been insignificant, as Mr Jones sought to characterise them at the pre-trial review, if they really had been, for example, typographical errors that were corrected or grammatical errors that were corrected, possibly headings added, it might be appropriate to uphold this ground but deny relief in relation to it. That's because, in those circumstances, the report would be substantively the same as the one that was approved by the group. But, as it transpires, it is clear that a number of the changes were not insignificant, and I have shown up at least one of them already I think. They were in numerous cases substantive changes. They involved the evaluation of evidence, purportedly by the group but not, in fact, so. They involved additional reasons, buttressing the conclusions of the group, but not, in fact, so, because they are somebody else's reasons. They involve subtle but significant changes to the reasoning in the report and they also involve changes to the legal characterisation or legal approach approved by the group.

Now, given our approach of parking remedies, I am not going to take you through all of the changes in detail and show you all of what is said in the evidence by

group members about them, because that really is for another day, if you are with us on the basic point that they were not entitled to make these changes. What I will seek to do is to do enough to at least persuade you that some of these changes at least were of a substantive nature, not of a typographical or other very minor change.

MR JUSTICE MARCUS SMITH: It is helpful you flag that, because I think it is probably important that we ensure that both parties are happy with where you are drawing stumps.

MR JOWELL: Yes.

MR JUSTICE MARCUS SMITH: And also that there is a sensible and appropriate end point to our judgment so that we can articulate what we will not consider. I think what you are going to be making submissions on is the point of principle; in other words, the extent to which there can or cannot be improper delegation in these circumstances.

MR JOWELL: Yes. I will seek to do it, if I am permitted, to seek to show you at least some of the changes are of a substantive nature. Whether they can be justified or not, that may be for another day, but I think I will seek to do at least that.

MR JUSTICE MARCUS SMITH: Certainly we do need at least to have one or two examples that you say go beyond the de minimis.

MR JOWELL: Yes.

MR JUSTICE MARCUS SMITH: Otherwise one might, if one were the CMA, ask why are we here? So that is understood. Mr Jones, is that satisfactory? I don't want the CMA in any way to be prejudiced or indeed the Tribunal put in difficulties if that approach is not a pragmatic and sensible one.

MR JONES: Sir, it sounds very sensible to me. I do want to take the Tribunal to

a few examples but I am happy for them to be the two or three that Mr Jowell chooses as his best ones to respond to. I am very happy to do that.

MR JUSTICE MARCUS SMITH: Absolutely. I don't think you should feel confined to Mr Jowell's examples. Obviously, it would be helpful if you did so, because it confines the material to a limited amount of material. But if you have a point to make in respect of anything else, then that's absolutely fine. I think it's really the fact that we are effectively kicking the last ground into the long grass. I don't think there's any way we can reach a conclusion on that, if this is the route we take, because we will have to work out, for this and other reasons, why remediation or what remediation should be. I think that's sensible but I wouldn't want the parties to be under any illusions as to where we are thinking our judgment must now stop, in light of the very sensible position you are taking.

MR JONES: I am grateful, sir.

MR JUSTICE MARCUS SMITH: Thank you both very much.

MR JOWELL: Thank you, Mr Chairman.

Against the background of that somewhat lengthy overview of my submissions, I will give you, if I may, a roadmap as to how I propose going forward to approach these.

I should explain that in part the order that I am adopting is driven by the undesirability I think of going in and out of closed session or at least minimising that so we can do it all in chunks.

I would like to start, therefore, if I may, by dealing with the law relevant to all three of these procedural grounds. I suspect that's going to take me through the statutes, through some of the case law relevant to consultation, duty to give reasons and delegation. Then, after that, to go into private session where

I can show you the various instances of failure to consult, various instances of unlawful excisions and, as I said, some of the substantive changes that were made after the provisional report was approved.

I think it is likely that I will probably spend most of this afternoon just on the law. I think I will run into tomorrow by an hour over the timetable, but I don't think we need to be concerned about that, because I am happy to lose that hour when it comes to the final day for ground 5 and 6. That's partly because I intend to take half of ground 5 effectively as part of these procedural grounds. So I am bringing that forward and therefore I think we can --

MR JUSTICE MARCUS SMITH: Mr Jowell, again for both parties, we will try to cut our cloth to ensure that you are not unduly, and I will emphasise "unduly" being forced to cut back your submissions. We are keen to hear from both parties.

MR JOWELL: I am grateful.

Could I start with the institutional structure? It is no doubt going to be very familiar to the Tribunal, but just important to bear it in mind when it comes particularly to ground 4A.

The Tribunal will recall that when the Enterprise Act was passed, back in 2002, mergers were dealt with by two separate institutions, the OFT and the Competition Commission. The OFT was involved in the first stage, the preliminary investigation, which decided whether there needed to be a reference for an in-depth investigation, and the Competition Commission then conducted and decided any in-depth investigation.

Under the Competition Act 1998, the Competition Commission's functions were generally exercisable by groups consisting in at least three persons, including a Chairman.

That institutional division reflected the previous position just before the Act, save that prior to the Enterprise Act in 2002, as you may recall, the Secretary of State had much more involvement, much more power in the ultimate decision-making responsibility over the outcome of any reference to the Competition Commission.

What the Enterprise Act did, in essence, was to strip the Secretary of State of his power, but keep the two institutions of the OFT and the Competition Commission separate. The virtue of having two separate institutions was that it was thought to ensure against confirmation bias, because another distinct institution revisited the matter afresh, and the particular virtue of the Competition Commission was that it consisted in groups of expert members, who provided independent oversight.

Now, in 2013, the Enterprise and Regulatory Reform Act of 2013, the ERRA, was passed, and this established the CMA as a statutory body corporate, created by section 25, and it replaced the old OFT and Competition Commission, which were abolished. But it is important to appreciate that whilst it created a single institution, the statute nonetheless split the CMA into two halves, the CMA Board and the CMA Panel. That division within the CMA broadly mirrored the old institutional division of responsibility between the two abolished institutions, the OFT and the Competition Commission.

The Board was to carry out the OFT functions and the Panel was to carry out the Competition Commission functions. The purpose of this division was to maintain those two virtues that I have mentioned, the avoiding the confirmation bias and maintaining independence.

If I could show you the explanatory notes to the ERRA, which you will see in volume 1 of your authorities bundle at tab 9, I believe, if you go to page 150,

you see 152 talks about the current regime:

"In the current regime, the OFT decides whether to refer a merger or a market for further investigation and the CC carries out that investigation. Decisions made by the OFT are made by its Board or staff where authority has been delegated to them by the Board. The CC's decision-making functions on merger cases are exercised by enquiry groups of members drawn from a pool of Panel members appointed by the Secretary of State. These groups exercise the functions of the Competition Commission for the purposes of the enquiries on which they are appointed."

You see the previous paragraph, paragraph 151:

"Schedule 4 provides the CMA with a corporate governance structure that ensures independence of its decision-making from Government and from the regulators against whose decisions it may hear appeals. The structure also provides for the separation and independence of decision-making within the CMA so that certain decisions are taken by the CMA's Board and others are taken by groups of independent members drawn from the CMA's Panel. This reflects the two phases of decision making in merger and market cases and the CMA's role in relation to regulatory appeals."

So that effectively confirms what I have just said about an institutional merger, but you keep the internal division between these two parts.

If you go to volume 11 of the authorities bundle, we put in the Government's 2012 response to the March 2011 consultation on the Act. You see that in tab 160. You see at the top of the page 11.18:

"The Government has decided that separation of phase one and phase two processes for mergers and markets will be ensured by separation and independence of decision-making for each phase. It is intended that the

decision-making structure will ensure that the benefits of a fresh pair of eyes for phase two cases and ring-fencing of regulatory appeals are maintained within the CMA, thereby preserving the strengths of the current regime."

If you go forward to 8471, paragraph 11.33, you will see it says:

"As noted above, the Government is committed to separation of decision-making as between phase one and phase two in merger and market cases and in the roles of CMA in dealing with sectoral regulators. The government considers that this is best achieved by providing for the decisions in phase two and market cases to be taken by panels made up of independent members drawn from a pool with relevant expertise. As such, the decision-making structures for the CMA will ensure that executives do not have any role as decision makers in such cases."

So a very clear split.

If I could then ask you to go to ERRA itself, which you will find in volume 1, tab 6, and if we could, please, go to page 122, so we've got the Board, which is the one half of the CMA.

"The CMA Board is to consist of the Chair and the members appointed under paragraph 11(b) to membership of the CMA Board."

The CMA Board, if one goes forward to paragraph 31 on page 124, we see under the heading "Proceedings" it says:

"The CMA Board may regulate its own proceedings."

Then it talks about consulting the Secretary of State.

In addition, the CMA Board has a power of delegation, which you see on the facing page, on page 123. You will see paragraph 29.1 provides:

"Anything that the CMA Board is required or permitted to do, including conferring authorisation under this sub-paragraph, may be done by (a) a member of the

CMA Board or a member of staff of the CMA who has been authorised for that purpose by the CMA Board, or (b) a committee or subcommittee of the CMA board that has been so authorised."

Pausing there, there are three notable features about the CMA Board's power to delegate. The first is that it expressly limits to whom functions may be delegated. The functions exercisable by the Board can only be delegated to the person or persons contained in that list. Secondly, there is no power to delegate certain functions. It says:

"Sub-paragraph (1) does not apply to the functions of deciding."

It also does make clear that sub-delegation is permissible as long as it is in accordance with the terms of the delegation. You see that in the brackets on the first line of 1:

"... (including conferring authorisation under this sub-paragraph)."

We say that these features support our submission under ground 4A, that when Parliament conferred a power under schedule 4 of this Act on CMA bodies to regulate their own procedure, that power does not extend to power to authorise delegation, because, as you have seen, they have got the power under 31 to regulate their own proceedings but clearly they also need an additional power to delegate, and if the power under 31 gave them free rein to delegate, you would not need paragraph 29. It would be otiose.

That clearly tells against any kind of general implied power to delegate under this particular Act. One sees elsewhere in the Act express powers to delegate. I don't think you need to turn it up but you see that also in paragraph 48 of the Act.

Paragraph 28 of this Act you will see on page 122 says in terms that:

"Except where otherwise provided by or under any enactment, the functions of the

CMA are exercisable by the CMA Board on behalf of the CMA."

If we go forward to the explanatory notes, this is fairly obvious in a sense, but if we go forward to page 151, you see the commentary on this at paragraph 172. It says:

"Paragraph 28 provides that the functions of the CMA will be exercisable by the Board, except where expressly provided otherwise. The result of this approach is that where an enactment confers functions on the CMA that are to be performed by a CMA group", so not the Board, "the enactment in question specifically provides that those functions are to be exercised by a group."

Shortly I will show you section 34 (c) of the Enterprise Act under which certain functions of the CMA are indeed specifically provided to be carried out or to be exercised by the group.

If we could go back then to tab 6, and I would like to now come on to the CMA Panel, which is the other half of the CMA. You see in paragraph 34:

"The CMA Panel is a panel of persons available for selection as members of a group constituted in accordance with this schedule."

The membership of the CMA Panel is regulated by paragraph 35, which you can see. It contains some details as to who is on the Panel, who must be on the Panel. I don't think you need to take it up, but in the explanatory note at paragraph 178 it notes that:

"These provisions provide for the establishment of a panel of independent experts to undertake phase two merger and market enquiries and carry out the CMA's regulatory appeal functions."

So that's the ERRA, and you see the very clear split.

If I may then turn next to the Enterprise Act, which in the previous tab, tab 35.

MR JUSTICE MARCUS SMITH: Tab 35?

MR JOWELL: Forgive me. Tab 5.

MR JUSTICE MARCUS SMITH: I am grateful.

MR JOWELL: I am going to go, if I may, to 34 (c), which is on page 50. You see 34 (c) stipulates that:

"Where a reference is made to the Chair of the CMA, under section 22 or 23, for the constitution of a group under schedule 4 of the ERRA, the functions of the CMA, under or by virtue of the following provisions of this part in relation to the matters concerned, are to be carried out on behalf of the CMA by the group so constituted."

You see amongst those provisions are sections 35 through to 41 (b) with certain specific exceptions.

So Parliament is specifying with great particularity precisely which functions must be carried out by the group and not, therefore, by the Board. Those include section 35, which you have seen already, and also section 38.

Our case is on this point, in relation to 4A, that section 34 (c) (1) is a clear statutory provision that requires the group to exercise these functions, and given that there's no statutory power to delegate on behalf of the group, it follows that such functions must be exercised personally by the group.

Now, if we go back to section 22, we see how things work where there's a reference. We see that on page 32, section 22 (1):

"The CMA shall make a reference to its Chair for the constitution of a group if the CMA believes it is or may be the case that a relevant merger situation has been created and the creation of that situation has resulted or may result in an SLC in the UK."

So that's the reference. Here this is the CMA making the reference. It is the Panel.

You see under section 22 (4) on the next page that:

"A reference under this section has to specify the enactment under which it is made and the date on which it is made."

You don't need to turn it up, but section 107 (1)(a) of this Act also stipulates that that reference must be published.

Forgive me for jumping back and forth but if you go forward to the next tab again, to the ERRA, and if I go to page 128, we see how the group comes to be constituted. Under section 36 you see:

"Where the Chair is by or under any enactment required to constitute a group under this schedule (a CMA group) the Chair must constitute the group in accordance with this part of the schedule."

Then you see in section 37 that the members of the group are to be selected by the Chair. You see in 38 that:

"Each group is to consist of at least three members of the CMA Panel."

If you go on, we see on the next page, 129, subsection (8):

"The Chair must appoint one of the members of a CMA group to chair the group (the group Chair)."

So one sees a clear distinction between the group, which is three, and the group Chairman on the other hand.

Against that background, if I may then turn back to the Enterprise Act. We have a key provision that falls to be construed under the point of principle on our ground 4A, which is section 38, and that's at page 55.

You see that section 38 stipulates that it means:

"The group", because we see the CMA for this purpose means the group, "shall prepare and publish a report on a reference under section 22 or 33 within the period permitted by section 39."

So it has to publish a report and has to do so within that period. Section (2):

"The report shall in particular contain the decisions of the group on the questions which it is required to answer by section 35.

(b) its reasons for its decision.

(c) such information as the group considers appropriate for facilitating a proper understanding of those questions and its reasons for its decisions."

Pausing there and reading that together with 34 (c), as I have done, that contains an unqualified duty that the report must contain the group's decisions, the group's reasons and the information that the group considers appropriate for understanding those reasons.

MR JUSTICE MARCUS SMITH: The amendment in 38 says "[CMA]" in square brackets. What was the word prior to CMA?

MR JOWELL: It would have been the Competition Commission.

MR JUSTICE MARCUS SMITH: Yes.

MR JOWELL: I should just mention at least what is the position where there's a statutory duty to provide reasons at the time of the decision and not all reasons are provided. The answer to that is that the law -- I don't think you need to take it up, but one can see it in cases like Ex Parte Ermakov, which is at tab 28. The law is that the provision of additional reasoning during the course of a later judicial review is something which will only be permitted exceptionally and with great caution. It is typically only where an error has been made in transcription or expression, or words have been inadvertently omitted, or where language used may be in some way lacking in clarity.

There is a duty here, of course, to publish the report. I should take you to what that means, because there's a statutory definition of it at section 129 of the Enterprise Act, which you will find -- section 129 starts on page 84, but the

definition is on page 85. You will see in subsection (4) at the bottom of the page:

"Any duty to publish which is imposed on a person by this part shall, unless the context otherwise required, be construed as a duty on that person to publish in such manner as he considers appropriate for the purpose of bringing the matter concerned to the attention of those likely to be affected by it."

I think that would obviously include the parties to the merger.

Just tying all these strands together, we make the following submissions on the statute. First of all, the report has to contain the decisions, the reasons and the information considered by the group to facilitate an understanding of those decisions and reasons. The report can also include other matters, and that's clear from the words "in particular" in section 38 (2). Other matters could include, for example, the procedural background, something like that, but it must at least contain those three things: the decision, the reasons and the information to understand them.

The obligation is on the group to prepare and publish the report. That must mean, when one looks at the sections, not just the decisions in the report, as I think the CMA seeks to maintain, but it must mean the report as a whole, including certainly the reasons and the facilitative information, and that's just the plain effect of section 34 (c).

We also say that preparing and publishing the report entails that the group has to approve the contents of the report, what's in it and what's not in it, otherwise the whole purpose of the statute would be undermined. It can't be good enough to say the group prepared most of the report and the CMA executive or staff members prepared other bits of it. It can't be good enough, as the CMA apparently suggests, for the group to approve the decisions in the report

but then leave someone else to write the reasons or some of the reasons. It has to include their reasons and the information that they consider facilitates an understanding of those reasons. The section just draws no distinction between the three matters.

We fully accept that the CMA staff can advise, they can recommend, they can assist, but they don't have authority to approve the content of the report. That is part of the function of preparing and publishing it, and that is the group's alone.

That interpretation is not only the natural meaning of the words, but it is also consistent, as I have shown you, with the purpose of the statute, which is, as I have shown you, to ensure that the independent Panel members have responsibility for those functions to ensure against confirmation bias and to ensure independence.

This is actually an important -- very important check and balance in the system, and its purpose would be undermined if the Panel members could delegate the carrying out of these functions back to the CMA Board or even to just one member of the group.

Could I turn next to authorities on delegation. I will start, if I may, with the case of the Crown v Secretary of State for the Environment, Hillingdon Borough Council, which you will find in volume 1, tab 20. You will see from the headnote on page 479:

"The standing orders of the Council made provision for certain of the Council's functions to be delegated to the Chairman of the relevant committee, including delegation to the Chairman of the Planning Committee to authorise the service of an enforcement notice under section 87 of the Town and Country Planning Act. The Chairman of the Planning Committee authorised the service of enforcement notices on a company, requiring it to comply with the

terms of the temporary planning permission. The company appealed to the Secretary of State, who ruled that the Council could not delegate their functions to a Chairman, since the power to delegate to a committee or subcommittee under section 101 of the Act did not include a committee of one."

This is now on an application for judicial review of the Secretary of State's decision. If you go to page 481 of the bundle, you will see it is in front of Mr Justice Woolf, as he then was. At the top of page 481 you will see:

"The Council contends that the decisions of the Secretary of State has got very serious consequences for local authorities generally. In an affidavit sworn off behalf of the Council, Mr Kosky avers that local authorities have commonly delegated their powers to Chairmen of their various committees. Such delegation has become known as 'Chairman action' and has for many years been considered necessary to the proper administration of local government business. Mr Samuels, who advances their arguments, echoes Mr Kosky's evidence and contends that without a procedure of delegation of this kind, local government would be impossible to administer."

So very strong arguments of convenience, of pragmatism. One sees if one goes forward to 483, and just pausing there we see on page 482, at letter E, you see what the section said:

"The section confers a power to delegate to a committee, a subcommittee or an officer of the authority. Delegation to a single individual other than an officer as such is not in terms provided for."

Then you see how it is dealt with on page 483. You see the various provisions. At B you see reference is made to the power to regulate proceedings:

"Subject to the provisions of this Act, a local authority may make standing orders for

the regulation of their proceedings and business and may vary or revoke any such orders."

You see what the judge says:

"It will be noted that the paragraph is subject to the provisions of the Act, and it does not deal with the power to delegate but with the regulation of the proceedings and business of the local authority, and that schedule has to be read together with section 99."

He says:

"This is to be contrasted with the provision of section 101, which deal expressly with the power to delegate and appear in the part of the Act dealing with the discharge of functions."

So a very similar situation to our case, where there's also a general power to regulate proceedings.

You see on the next page, 484, between B and C, you see the judge says:

"Mr Samuels has to acknowledge that in ordinary parlance a committee or subcommittee pre-supposes more than one individual."

Well, if that's true of a committee or subcommittee, of course, it is even more true of a group, that that pre-supposes more than one individual.

Finally, at page 486, you see from D to G. Perhaps I could just invite you to read to yourselves from D to G on the page. (Pause.)

For the benefit of your note, that judgment of Mr Justice Woolf was adopted in whole by the Court of Appeal. You will see that in tab 22.

You will see the reference there to the possibility of traumatic results. In the present case the results of saying that the group has to decide on the contents of all of the report or at least on all of the decisions, reasons and information in the report would not be traumatic in the least, in the general case, because all

they need to do is approve the final report. That's not administratively difficult.

The next case I should take you to is McKee v The Attorney-General for Northern Ireland, which you will find in volume 5 of the authorities bundle at tab 88. You will see on page 3127 in paragraph 2 that:

"The issues of law raised on the three appeals, which are namely whether the relevant legislation permits the discharge of the Charity Commission's statutory powers, duties and functions by its staff. If yes, the enquiry ends. If no, there arises a second question, namely whether the legislation permits delegation of some or all of the Charity Commission's functions et al to be performed by its staff."

Having agreed with the judge below that this was a matter of statutory construction, that the Charity Commission was obliged to carry out its powers, duties and functions by the Act, and it did not empower any members of staff of the Charity Commission to exercise any of the Commission's statutory powers or to discharge any of its statutory functions.

You will see that in paragraph 30 at 3145:

"We consider that in the language of this section of the Interpretation Act the Commission's right to regulate its own procedure in business does not speak to the question of who is empowered by the Act to exercise and perform the powers, duties and functions which it creates. There's a clear distinction between the regulation of the Commission's procedure and business and the identification of those who are authorised and required by the Act to exercise and perform the Commission's substantive powers, duties and functions. The former is subservient to the latter. The former is confined to the practical arrangements and day-to-day mechanics for the exercise and discharge of the statutory powers, duties and functions. Statutory models have traditionally

and consistently distinguished between jurisdiction or capacity or vires, the terms being interchangeable, on the one hand, and process and procedure on the other. We consider that the section recognises this distinction."

Then it turns after that to the question of implied power to delegate, which we see on page 3148, at paragraph 39:

"Delegatus non potest delegare. As a general rule the repository of a statutory power duty or function is a delegate of the legislature, and as such is impotent to subdelegate, absent express statutory authorisation. However, certain exceptions to this hallowed principle. Of the common law have been recognised. The specific question is whether the Charity Commission can lawfully delegate its statutory powers, duties and functions or any of them to its staff. "

In paragraph 41 we see reference to the very limited circumstances in which an implied power to delegate will be found, referring back to the judgment of Lord Justice Beatson in Noon v Matthews. That's only when the court considers the delegation is inevitable. You see that in the second paragraph quoted.

Well, the circumstances of the present case don't come close to establishing that delegation was inevitable. The group was perfectly capable of approving the entire report.

Sections 44 and 45 -- I don't intend to read them to you -- they draw a clear distinction between the role of the staff in research, information gathering, briefing, advice and recommendation, on the one hand, and, on the other hand, the exercise of the statutory powers, duties and functions that must be carried out by those to whom the task is delegated in the present case.

The consequence of this, as I come on to, is if there is an unlawful delegation, the

result is that the decision was either never made or the purported decision effectively needs to be quashed. That's at least the prima facie position. Of course, there is always a discretion in relation to remedies, but we would have to come back to that.

So those are our submissions on the law relating to delegation.

Thinking about the time, would this be a convenient movement? I am very much in your hands. I could go further.

MR JUSTICE MARCUS SMITH: You are going into some facts next?

MR JOWELL: No, I am going to go into more law, but that's going to take a bit of time.

MR JUSTICE MARCUS SMITH: In that case we will rise until 3.15.

MR JOWELL: I am grateful, sir.

(Short break)

MR JUSTICE MARCUS SMITH: Mr Jowell, more law.

MR JOWELL: More law I am afraid. It is a bit dry, but that's part of the problem of going through it all in one go.

MR JUSTICE MARCUS SMITH: Good idea.

MR JOWELL: If I could go now, please, to the authorities and the statute on the duty to consult. I will start, if I may, on page 70 of the authorities bundle, tab 5 of the Enterprise Act. It is at page 70. You will see that:

"Section 104 (2) applies where the group is proposing to make a decision on the questions under sections 35 (1) or 35 (3) of the Enterprise Act, which it considers is likely to be adverse to the interests of a relevant party."

Now "a relevant party" -- you don't need to go to it -- is defined in section 1046 to mean:

"Any person who appears to the group to control enterprises which are the subject of

the reference concerned."

So effectively the merger parties.

Section 104 (2) says, as you can see that:

"The relevant authority shall, so far as practicable, consult that party about what is proposed before making that decision."

You will see that 104 (3) says:

"In consulting the party concerned, the relevant authority shall, so far as practicable, give the reasons of the relevant authority for the proposed decision."

In subsection (4) you will see it says:

"In considering what is practicable, the authority shall have regard to any restrictions imposed by any timetable for making the decision and any need to keep what is proposed or the reasons for it confidential."

Now, three points in particular about this section we draw attention to.

First, it arises only in relation to the proposed decisions under section 35 (1) and (3). So the CMA typically seeks to discharge that duty by way of provision of its provisional findings and notice of possible remedies.

We accept, therefore, that the duty under section 104 doesn't apply to consultation documents that are prior to that. It doesn't apply itself to working papers or statements of issues, which will typically be at an earlier stage of the proceedings. Nevertheless, as I will show you from the authorities, a duty of procedural fairness still arises at those stages, by virtue of the common law.

So if there is a consultation at those earlier stages, it must be a fair consultation, and you will see that in particular when it comes to the recent Sainsbury's authority.

More generally, the common law principle of procedural fairness applies to the whole process viewed as a whole.

The second point we would observe is that the group at this provisional stage only needs to give its proposed reasons so far as that is practicable, and that it can take into account in that regard that some of what is proposed or the reasons for it may be confidential. That is not a qualification that applies under section 38 to the reasons for the final decision. There is no similar qualification when it comes to the final decision. There it must give all of its reasons.

The third point we would observe is that the duty of consultation is confined to the merged parties, as you have seen. So there's no duty to publish the material beyond that, but again there is a duty to publish the report more broadly, as you have seen. That has to be published to all of those who are likely to be affected by it.

The next area I should look at are those provisions which concern specified information, which you will see on page 90 of the Act under part 9. This applies to specified information which relates to the affairs of an individual or the business of an undertaking. Section 237 (2) provides that:

"The specified information to which it applies is not to be disclosed while the undertaking continues in business."

So, in other words, section 237 slams the door shut on the disclosure of specified information. But it is important to note section 237 (6) over the page provides that:

"This part does not affect any power or duty to disclose information that exists apart from part 9."

So where there is a power under section 38 (2) (c), actually this prohibition does not bite, although, as I come on to, section 244 is still relevant, but this prohibition does not bite on that. It does bite potentially on the duty to consult at the

earlier stage.

Then, whilst this door shuts, then another door opens. You see that in Section 241, which is on page 93. It provides in subsections 1 and 3 that:

"A public authority which holds information to which section 237 applies may disclose that information for the purposes of facilitating the exercise by the authority of any function it has under or by virtue of this Act or any other enactment. A public authority which holds information to which section 237 applies may disclose that information to any other person for the purpose of facilitating the exercise by that person of any function he has under or by virtue of the Act."

So, in effect, the two provisions cancel each other out.

We then come to section 44, which contains three considerations to which the CMA must have regard before disclosing any specified information under a power or duty to publish information. The three matters to which the CMA is required to have regard are, one, the need to exclude from disclosure, so far as practicable, any information whose disclosure the authority thinks is contrary to the public interest; two, the need to exclude commercial information whose disclosure the authority thinks might significantly harm legitimate business interests of the undertaking to which it relates; and, thirdly, the extent to which the disclosure of the information mentioned in those subsections is necessary for the purpose for which the authority is permitted to make the disclosure.

So that subsection expressly contemplates that it may be necessary for the group to make disclosure of commercial information which, even if it might significantly harm the legitimate business interests of the undertaking to which it relates, where that is necessary to discharge the statutory duty, for example, under section 38 (2) (c) or indeed under section 104.

Importantly, when one bears in mind section 34 (c), which I have shown you, it is for the group to weigh up those considerations. It is for the group to decide whether and what to disclose, whether that's at the stage of consultation or at the stage of the decision.

That's important, because it seems as though in this case it was the CMA staff or perhaps the Chairman alone who weighed up those considerations.

Finally, I should just show you section 118, which is a specific provision which permits excisions from reports by the Secretary of State of particular types of report and on particular grounds.

We do say that that provision tells against a general power to make excisions from reports, but it certainly tells against a power on the part of anyone other than the group, the body that's responsible for preparing and publishing a report, to make excisions.

May I turn next then to certain of the case law on consultation and fairness? I will start, if I may, with an authority that will be very familiar to the Chairman of the Tribunal, which is in volume 3 at tab 59. That is the BMI healthcare case. This considered both the duty to consult and the duty to give reasons in the parallel context of market investigations, but it has been adopted in subsequent cases in this context as well of merger references.

If I could go, please, to 1761, and at paragraph 37 one sees the familiar citation from Ex Parte Doody of Lord Mustill's well-known articulation of the general principles of what a fair hearing requires, and then a citation below that from Lord Denning. Then Mr Justice Charles, in another case:

"One of the basic requirements of procedural fairness is that the decision maker must disclose to the person affected, in advance of the decision, information of relevance to the decision so that the person affected has an opportunity to

controvert it or to comment on it."

Information of relevance includes information that's favourable to the person affected as well as information that is adverse. If authority for that is required, just for your note, there is the case of ex parte Hickey in the bundle, which is in volume 1, tab 27, and I would refer you to pages 631 and 635.

The requirement to provide information of relevance to the decision is a basic requirement of procedural fairness. It doesn't, of course, in the context of a merger enquiry mean all the evidence collated by the CMA, but it does involve at least the gist of all information that is of obvious relevance to the decision or the proposed decision.

There's a summary that has been oft-cited in the judgment at paragraph 39 of the requirements in a competition context. We would draw particular attention to sub-paragraph (7) on page 1764, where, Mr Chairman, you say:

"Finally, whilst Lord Mustill's sixth proposition refers to a person affected by a decision being informed of the gist of the case which he has to answer, what constitutes the gist of a case is acutely context sensitive. Indeed, 'gist' is a peculiarly vague term. Competition cases are redolent with technical and complex issues which can openly be understood and so challenged or responded to when the detail is revealed. Whilst it is obviously, in the first instance, for the Commission to decide how much to reveal when consulting, we have little doubt disclosing the gist of the Commission's reasoning will often involve a high level of specificity. Indeed, this can be seen in the Commission's practice described in paragraph 7.1 of the CC7 guidance of disclosing its provisional findings as part of its consultation process, and the point is well illustrated by the approach taken by the Court of Appeal in the case of R v Eli Lilly Ltd and NICE."

That was approved in the context of merger references in the Eurotunnel judgment, which, Mr Chairman, you will obviously be familiar with. That is in the bundle at tab 62. I don't need to take you to it.

What I would like to go to, if I may, also in this volume, is tab 66, which is the judgment of the Court of Appeal in the Ryanair case.

If I could invite you to go, please, to paragraph 35, you will see in this judgment what was excised from the decision were the names of two airlines and that was not revealed to Ryanair. You will see the argument of Ryanair. It is said that the identifies of the airlines in question were withheld from it. In paragraph 36, the last two sentences, you see:

"The consequences of the non-disclosure, says Lord Pike, was that Ryanair was unable to make effective submissions on the credibility of the evidence and the likelihood of any such combination and was seriously prejudiced in the result. If the CC was not prepared to disclose the names and other information, it should not have relied upon the evidence in reaching the conclusions on this issue."

So that is the submission at 36.

Then, in paragraph 37, one sees a clarification of what Ryanair did and didn't see. It turns out that, on analysis, the only thing that they didn't see of any potential importance were the names. You see that in the third line from the bottom up:

"His complaint is limited to the fact that Ryanair was not given the names."

One can see in paragraph 39 what is said there. We see, if one takes it from the second sentence, about five lines down:

"The CMA accepts that if the sensitivity of the information would justify it being withheld under section 244, but its disclosure is necessary for the purpose of carrying out the consultation exercise under section 104, then the proper

resolution of that conflict should ordinarily be achieved by the CMA not relying upon the evidence for the purpose of determining the reference. This view was endorsed by the CAT in paragraph 134 of its judgment, with which I agree."

If you could go back to the CAT's judgment for a moment, holding one's finger, and go back to tab 63, you will see at 2072 that relevant paragraph 134. You see what's said:

"We accept that once it has been determined by the CC that fairness does require disclosure, then disclosure should be made, whether directly to the person affected or to its representatives in some form, including by way of confidentiality ring or data room process. If the material is so sensitive that no such disclosure can be made, then it should usually follow that the CC should not rely upon such material in its decision."

You see then it goes on to say:

"In the process leading to the final report and in the final report itself."

So it's clear that the CAT was considering not just the proposed decision but also the actual decision.

That is critical to our submissions on this point, because we say on a general case, if it is so confidential that you cannot refer to it, you shouldn't rely on it.

MR JUSTICE MARCUS SMITH: Yes.

MR JOWELL: If one goes back to the Court of Appeal's judgment at paragraphs 42 to 44 -- I don't think I need to take you through it -- the Court of Appeal concludes the identity of the airlines was just unnecessary in that case for Ryanair to make its case about the unlikelihood of the combinations.

We see in 46 to 47 the approval of the CAT's analysis of the final decision.

One point I would also show you is the way the Court of Appeal characterises the

task of the CAT in review. This I think is a useful clarification of the law in this area. You will see that in the last couple of sentences of paragraph 39. What they say is this:

"The common law principle of fairness which the court is required to apply to test the legality of the proceedings conducted by the CC is accommodated by the statutory framework governing disclosure through the focus of what is necessary for those proceedings to be fairly and effectively concluded. The task of the CAT was therefore" -- so this is the CAT in reviewing that -- "was to determine whether a fair process has been followed in circumstances where the consultation exercise has been carried out without the disclosure of the names. This requires an objective analysis of the process, but one which admits only of a single answer."

They cite the Supreme Court case of Osborn v The Parole Board.

So whilst one can take into account the views and one should take into account the views of the underlying authority, ultimately it is an objective analysis, and it admits of only one answer as to whether there has been a fair procedure.

That may be perhaps a slight change of emphasis in the case law in this area and it is important to take it into account, in our submission.

What we take really from Ryanair is that it applies both to the provisional findings and also to the final decision. The general position is if you are not prepared to disclose sensitive information, you shouldn't rely on it. In that case it was permissible to disclose the names of two airlines, but in effect what they are saying is that: "Well, you didn't need to make excisions. You could in a way almost have reformulated or reframed or rephrased the report in such a way that you could have reached the same conclusions by just saying, for example 'some airlines' or 'certain airlines'. Either way the effect would be the same".

What one can't take from Ryanair is that it is permissible to excise from proposed or actual decisions actual reasons or information that is necessary to those reasons on which people should fairly be consulted. If you are not prepared to provide that information, you shouldn't rely on it. If it is necessary for a fair process, then effectively you have to disclose it.

MR JUSTICE MARCUS SMITH: It goes really to the debate we had last week about the use of elliptical references rather than scissors.

MR JOWELL: Yes, indeed.

MR JUSTICE MARCUS SMITH: It is really asking can one phrase a point fairly in an elliptical way? The real question, to take this example, is does the name of the entity involved actually matter? If it matters then an elliptical reference is as bad as the scissors market, but if the name does not matter, then why have the scissors? Use the elliptical reference. The substantive point is exactly the same.

MR JOWELL: I quite agree.

Could I finally take you very briefly to two authorities on the general duty of fairness to show that it is not limited to the statutory duty to consult?

The first is the recent Sainsbury's authority in volume 4 of the authorities bundles at tab 79. If you pick it up at 2696, one sees the background which is the refusal -- you see Mr McIntosh of the CMA -- I think it may be the same Mr McIntosh -- that's a coincidence -- refusing to extend time beyond a further ten days for responses to multiple working papers.

You see in paragraph 55 there's a reference to the familiar cases of Osborn and Lord Hoffmann. In paragraph 56, over the page at 2697, we see reference to the Sports Direct case. In paragraph 57 we see:

"For the CMA Ms Demetriou emphasised that the only statutory obligation to consult

is in section 104, which the CMA satisfies by putting out its provisional findings for consultation. Moreover, section 104 recognises that the duty applies only so far as practicable."

You then see in paragraph 63, however, that the concession is made:

"For its part, the CMA very properly accepted that although there was no statutory requirement to disclose its working papers to the applicants, or indeed to give them an opportunity to make representations in response, once it chose to disclose those working papers and invited comments, then the applicant's procedural rights were engaged."

Paragraph 70 and so on then concludes on the facts. The overall duty of fairness did require more time to be given to respond to those working papers.

Finally, if I may go back again to, if I may say so, an elegant summary of the law, the general law, which one sees back in the authorities bundle, volume 4, tab 75. We are back in the Law Society v the Lord Chancellor, the judgment of Lord Justice Leggatt and Mrs Justice Carr.

If I could invite you to look at paragraph 67, where they begin the section:

"What proper consultation requires."

If I could pick it up in paragraph 71, a quote from Mr Justice Ouseley:

"What needs to be published about the proposal is very much a matter for the judgment of the person carrying out the consultation to whose decision the courts will accord a very broad discretion, but in my judgment sufficient information to enable an intelligible response requires the consultee to know not just what the proposal is, in whatever detail is necessary, but also the factors likely to be of substantial importance to the decision or the basis on which the decision is likely to be taken."

Then it refers to the judgment of Mr Justice Burnett. Then it says:

"In principle and consistently with these authorities in judging whether non-disclosure of particular information made a consultation process so unfair as to be unlawful, relevant conversations in our view include, (i), the nature and potential impact of the proposal put out for consultation, (ii), the importance of the information to the justification for the proposal and for the decision ultimately taken, (iii), whether there is a good reason for not disclosing the information, and, (iv), whether consultees were prejudiced by the non-disclosure. In relation to the last of these matters, whilst it is no part of the court's function to assess the merits of the arguments for or against the proposal, it is relevant in our view in judging whether the process was fair to consider whether the non-disclosure of information has prejudiced consultees by depriving them of the opportunity of making representations which would have been material for the decision maker to take into account."

We seek to apply those various factors and we will say that clearly what was put out for consultation was of some considerable importance involving, as it did, potential interference with article 1, protocol 1 rights. The various forms of information withheld was also of considerable importance to the decision, as I will seek to show up. Thirdly, there was no good reason for not disclosing the information, at least within a confidentiality ring.

Finally, we say that Meta was prejudiced, because it was deprived of the opportunity of making representations which it would have been material for the decision maker to take into account.

I then come to the end of my long trawl through the law. I am now, if I may, going to identify the five main instances of information that was withheld and we say should have been provided for there to have been a fair consultation.

We have I think sent to the Tribunal for its convenience a table in which you will see

the confidential version of the provisional findings, what was in the decision and what was in the redacted versions of the provisional findings so that you can see them.

MR JUSTICE MARCUS SMITH: We have three tables, unlawful failure to consult, unlawful excision and unlawful delegation.

MR JOWELL: It is the unlawful failure to consult I am going to go to first if I may.

MR JUSTICE MARCUS SMITH: Very good.

MR JOWELL: The first of these relates to Snap's purchase of Gyfcat. I would like to remind the Tribunal of the chronology of events here, because it is relevant to the fairness of the process.

Snap purchased Gfycat in May 2020, so shortly after the merger between Meta and GIPHY. We are told it was a response by Snap to the merger.

The CMA learned about Snap's acquisition by 24th June 2020, so just a month or so after it happened. At the same time, or not too long afterwards, we assume the CMA also learned the additional information that I will have to come to in closed session. I will show you some of Snap's contemporaneous documents that reflect that that were in the CMA's possession.

One then has the phase one merger process. January 2021 through to March 2021. The CMA makes no mention of it. There is then reference made to phase two, and CMA issues an issues paper on 5th May 2021. No mention.

We then have working papers on the vertical theory of harm in June 2021. Still no mention of Snap's acquisition of Gfycat. Not even mentioned. Later, in June 2021, there are hearings of the main parties. Nothing is said. No mention.

We then come to 12th August 2021. The provisional findings are provided to Meta in the middle of August, on 12th August. They are provided in a heavily

redacted state. There's no mention in the redacted versions of Snap's acquisition of Gfycat.

Meta's solicitors then seek unredaction. We are told that at the same time CMA were seeking of its own motion to provide some unredacted passages, but the first contact was by the solicitors to the CMA.

Then, shortly after, a confidentiality ring is agreed, and some limited unredactions are provided on 25th August for external advisers only. That's the first time that anyone acting for Meta is told about Snap's purchase of Gfycat. So 25th August, two weeks after the provision of the provisional findings, in the heart of August, in the heart of the holiday season, with a deadline to respond to the provisional findings by 2nd September.

Now, the CMA say: "Well, don't worry, because we later extended the deadline and you provided further information". But one also needs to bear in mind that just five weeks after 2nd September, on 7th October -- let me show you what was going on internally at the CMA. This is in volume 9 of the main bundle at tab 102.

This is an internal minute of a CMA meeting. You will see in paragraph 6, over the page, someone presented to the group on the theory of harm 2. Then 6:

"The group discussed this."

Theory of harm 2 is the vertical theory:

"It gave a steer to the case team that they should begin drafting the final report on the grounds that the group will confirm its provisional decision that there is a substantial lessening of competition concerning TOH2."

So one has a steer to the case team giving instructions to write up the final report on the basis of the vertical SLC.

Now, it is true that it says this is subject to any additional evidence, and it is true that

further evidence was provided by Meta on 18th October, and was apparently considered by the group on 22nd October. But the fact remains that this was extraordinarily late disclosure, by any measure. We query -- we more than query -- we challenge whether this was genuinely given consideration at a formative stage of their thinking.

The consideration of the further evidence is provided on 28th October, so over three weeks after the CMA had already been given instructions to write up the report on the basis of the vertical SLC.

If you go to tab 108 in this bundle, you see how it is treated. All we know is what's in paragraph 4 and 5:

"Mr McNabo presented on the additional submissions received from the parties on 18th October. The group discussed this and how the submissions should be considered in the final report."

That's it. We say that was not at a formative stage, but what's more, when one put the two things together is when it really becomes very clear that this was not a fair procedure, and that's when one takes into account that we had not been provided with all the information that was very important. Further information we were never told. That is something I will have to deal with in private session. Perhaps if for the last half hour we could go into private session, I would be grateful.

MR JUSTICE MARCUS SMITH: I hope the ruling that explains the process we are following is now -- it should be. But for reasons given in that ruling we must now stop the live stream and I am afraid those who are not in the confidentiality ring will again have to leave the room.

I take it we are going to be in private session for the rest of the afternoon?

MR JOWELL: Yes, we will.

MR JUSTICE MARCUS SMITH: Will we be resuming in private session tomorrow?

MR JOWELL: I am afraid we will.

MR JUSTICE MARCUS SMITH: We will do our best to ensure that some sort of indication is given on the website as to when one might expect a public session to resume so that those who can't be present don't have to be hanging around tomorrow morning when they shouldn't be, but if those who are not permitted to be here could make their exit, I would be very grateful.

(COURT IN PRIVATE SESSION UNTIL ADJOURNMENT AT 4.30 pm)