IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1429/4/12/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 25 April – Thursday 28 April 2022

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

BETWEEN:

Meta Platforms, Inc.

Applicant

v

Competition and Markets Authority

Respondent

A P P E A R AN C E S

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

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Thursday, 28th April 2022

(Hearing commenced in private session)

(IN PUBLIC SESSION)

Reply on grounds 4 and 4A by APPLICANT (cont.)

MR JOWELL: [First few words spoken not heard by stenographer as court audio stream not turned on] ... or on the duty to consult. The Tribunal asked my learned friend whether one could elucidate further the gist test in order to assist in the identification of the type of information that ought to be disclosed. We are both agreed that the four factors identified in the judgment of the Law Society and the Lord Chancellor are certainly relevant.

There is one further authority that we think is particularly illuminating in addition, of course, to the Eurotunnel judgment that my lettered friend took you to. The additional authority is one that I did refer to in opening and I made reference to the passages, but I didn't actually take you to them. I think in light of the question I think I should. It is in volume 1, tab 27 and it is the judgment in ex parte Hickey. You will see if one can pick up from the headnote that the applicants in this case had applied to the Secretary of State for the referral of their convictions to the Court of Appeal for review, and in each case the Secretary of State ordered substantial police enquiries, but refused to discuss to the applicants any of the information revealed thereby when deciding whether to make a reference and decided not to refer any of the cases to the Court of Appeal.

So it is strictly an administrative case.

"The Secretary of State was prepared to expand on the reasons for his decisions but wouldn't disclose any statements obtained in the investigations and the policy was when deciding whether to make a reference was to do so only when new

evidence or some other substantial consideration which had not been before the court appeared to cast doubt on the safety of the convictions."

The applicants applied for declarations that they should have been given fuller disclosure.

If one picks it up at page 631, which is the reference that I gave to you in opening, just below letter C. In the judgment of Lord Justice Simon Brown, as he then was, and he says this:

"That brings me to the altogether more difficult question of the precise requirements of just disclosure in this area of decision making. A good deal of argument before us was devoted to this, in particular with regard to expert evidence, police evidence, complainants' evidence and the like. Does fairness demand that expert reports, police statements, further statements from central witnesses and so forth be disclosed verbatim or will the gist do? What does the gist, the substance, really consist of? Should disclosure only be made of adverse material or is it necessary to disclose favourable fresh evidence too? These questions I propose to address in the context of the four individual cases now before us. It is one thing to decide against the broad background of these cases what generally are the requirements of procedural fairness in this field, quite another to rule on the specific level of disclosure to be made, which must inevitably depend on the facts of a particular case. The guiding principle should always be that sufficient disclosure should be given to enable the petitioner properly to present his best case. That can only be done if he adequately appreciates the nature and extent of the evidence elicited by the Secretary of State's enquiries."

If you go forward to page 635, please, you will see just above the letter E, Lord Justice Simon Brown says:

"I have no doubt that Dr Shepperd's report should have been disclosed. He himself was clearly outraged when it was not. It has not indeed been mentioned. The Secretary of State should, I believe, alert petitioners to the existence of favourable as well as adverse new material, whether verbatim or as to its gist, being ultimately a matter for him."

I referred you to it in opening as an illustration of that point, that it is favourable material as well that must be provided, but we also say that the guiding principle of fairness that demands that sufficient disclosure should be given to enable the affected person to present their best case, and we say that that is a very good touchstone to use.

I would also add this, in the context of the present case. We say, contrary to my learned friend, that all the information that the group decides to include in the decision or in the provisional decision effectively should be provided to the merger parties. That's our primary case, and our alternative case is that it at least should be provided unless there are compelling reasons of confidentiality not to do so, but even in those circumstances if the information can be provided to external advisers within a confidentiality ring without breaching any confidentiality concerns, then it should be so disclosed.

It is important that my learned friend has never sought to suggest that in relation to any of this information that actually there were any good reasons why the information that we have now received could not have been disclosed into an external advisers' confidentiality ring.

So we say that that applies to all information in the provisional decision or decision, but we certainly say that it must apply to all information of relevance. When I say relevance, I think a reasonable test we would suggest is does it fall within the CPR test for standard disclosure, so information liable to advance

the affected party's case or to harm the CMA's case? We don't suggest that the documents themselves have to be disclosed, but if there's relevant information in them, the gist of that information has to be disclosed.

We say that clearly if the information features in the provisional decision or in the final decision, then it should be provided as part of the consultation.

MR JUSTICE MARCUS SMITH: Mr Jowell, is there any authority -- I am not aware of it and I am sure it would have been cited if you were, but I will ask anyway -- which deals with disclosure and disclosure of the gist, in circumstances where it is the decision itself that has been redacted? It's a point that I touched on with Mr Jones yesterday, that BMI, Eurotunnel, this case, all of the cases are dealing with the withholding of material that was considered by the decision maker and which may or may not and to a degree debatable informed the decision, but the decision itself was not redacted.

MR JOWELL: The only authority I can think of is Ryanair, but it is just the names of the airlines.

MR JUSTICE MARCUS SMITH: Yes.

MR JOWELL: Effectively, you have had my submissions on that case. Really the difficulty is when one thinks about the provisional decision, it is particularly peculiar, because the whole purpose of the provisional decision is to give the person affected an opportunity to make submissions. It is not there so that there is some draft internally for the CMA. It is meant to be an external facing document.

MR JUSTICE MARCUS SMITH: It is to enable you to push back.

MR JOWELL: That's right. The notion that you give it but you take away the guts of it or some of the guts of it is anathema, in my submission.

The thrust of my learned friend's submission on the importance of the information not

disclosed was that it would not have added to what we said already and, therefore, effectively, well, you would have made basically the same submissions or you made them already.

They also say the CMA, in its wisdom, could take the submissions we have made already, combine it with the additional information that only it knew, and come to its conclusions.

We say that that approach can be compared to the following scenario. Forgive me for giving an analogy. Suppose that the police have indicted the accused with the crime of grievous bodily harm consisting of a stabbing, and the police have evidence that a third party was seen running away from the crime scene holding a knife, and they disclose that information to the accused and to his lawyers. On that basis, the accused makes representations and he says: Well, the third party, not he, was likely to have committed the crime.

It later transpires, after the accused is convicted, that the police did not disclose the fact that the knife was later retrieved and found possibly to have traces of the victim's DNA on it. When the convicted person complains, the police's response was as follows. They say: "Well, you submitted that we should investigate the third party. We did so. In fact, when we looked at the details of your submissions, look, you even submitted that we should try to get the knife and check it for DNA. As it happened, we looked at the DNA on the knife and we considered it with our forensic experts, and we concluded that the traces we found were not conclusive. So, you see, we looked into it all. Nothing you said could have made a difference. No unfairness here."

That's essentially what my learned friend's submissions amount to. What that approach ignores, first and foremost, as is obvious in fact, is that, as the cases remind us, fairness is not just about the outcome. It is also, indeed

principally, about the process. The person affected, particularly one who is potentially to be deprived of their liberty or in this case a substantial amount of their property, is entitled to an opportunity to make their best case, as the Hickey case shows, on the basis of the relevant information available and a right to be heard on it.

As Lord Hoffmann said in the AF case that's quoted in Sainsbury's, at paragraph 55 for your note. I am not taking you to it. Volume 4, tab 79, page 2697:

"There is an important value in avoiding the sense of injustice which the person who is the subject of the decision will otherwise feel. Justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative functions, and that respect entails fair participation in the procedure."

That's particularly important in the context where, because we are restricted before this Tribunal to a judicial review standard, the administrative phase is the only opportunity that persons in Meta's position have to make submissions on the strength of the evidence and on the weighing of the evidence.

If you don't have access to that evidence, the critical or important bits of it, you will never have an ability to be heard.

Now, the second point my learned friend's approach ignores, and I will have to come to it in closed session in more detail, he suggests effectively that the additional information that Meta and its legal representatives would have had couldn't and wouldn't have made a substantial difference and we couldn't and wouldn't have made stronger submissions to the CMA.

Now, we don't accept that such submissions would necessarily have made no difference to the ultimate outcome, and indeed we are a bit concerned about

that, my learned friend's suggestion, because it comes quite close really to the suggestion that nothing we would have said would have made any difference because the CMA had in fact already made up its mind in its provisional decision.

Well, perhaps they had, but that in itself would only prove our additional case that the very late stage of consultation itself constituted unfairness. One cannot just assume that because they gave us this information very late and had a provisional view that that view would have remained unchanged, had we had a proper opportunity to make representations on the material.

MR JUSTICE MARCUS SMITH: Mr Jowell, I don't think I am particularly attracted by that submission. I have to say I think we really need to proceed on the basis that the CMA would have considered submissions in a fair and open way.

MR JOWELL: Indeed, but I think where one needs --

MR JUSTICE MARCUS SMITH: But if I can reframe your point to see where it goes, we are obviously going to have to think very hard about what "gist" means, and I continue to have the sense that it may be doing an awful lot of hard work and not actually to be a very helpful test for what is a fair process.

MR JOWELL: Yes.

MR JUSTICE MARCUS SMITH: The point you have just made is that this is a judicial review where the merits are explicitly off the table. So the merits can only be tested, as you have just said, during the administrative phase. We are talking about a decision which has some very granular factual findings in it. It is a long decision. It is hugely detailed. It is very carefully done. The facts obviously matter.

MR JOWELL: Yes.

MR JUSTICE MARCUS SMITH: What has happened is that some facts have been

omitted and you have never seen them. It doesn't mean that you don't understand the direction of travel. It doesn't mean that you can't push back in the ways that you have, and I suspect that we will obviously have to look at the redactions with great care, but I suspect there's nothing in the redactions that would have enabled you, had you seen them, to make a new point.

Now, we will obviously look at it and we will see --

MR JOWELL: We don't dispute that so far. It depends what one means by "new point".

MR JUSTICE MARCUS SMITH: It does. What I am getting at is that if the facts matter, the granular detail matters, and there's a fact omitted that goes to a point that you know is being made, then ought you, as a matter of fairness, to be able to say "this fact is wrong or it has been over-emphasised", and the ability to make that point is lost and the question is whether you have been unfairly treated because the point has been omitted?

MR JOWELL: Yes.

MR JUSTICE MARCUS SMITH: I am afraid it does go back to the overkill point, which I have to say is troubling me somewhat, in that if it's in the decision, then surely the inference ought to be that it matters?

MR JOWELL: Well, we say that in spades, Mr Chairman.

MR JUSTICE MARCUS SMITH: We are going to have to take that extremely carefully and think about it.

MR JOWELL: We would add to that a lot of these points -- I mean, I can't mention them -- if we take, for example, our first and foremost point that we say has been omitted, relating to the Gyfcat/Snap situation, it is not just in the decision. It is also, on any view, relevant. We say that it is just unacceptable for a merger party who is being asked to unwind a merger to find out for the

first time in the confidential version of the decision that there is a relevant -- and we would say highly relevant, but on any view relevant, exculpatory piece of information that was withheld from it throughout the decision-making process. That we say is just a quintessential instance of procedural unfairness. So that's what I want to say about the consultation points.

If I could turn next to the question of reasons and excisions and so on. Mr Jones asserted that there existed in the common law a sharp distinction, he suggested, between reasons and information relevant to those reasons. The authority that he took you to was the Porter case, which is quoted in BAA. I don't intend to invite you to go to it, but again it is in volume 3 of the authorities, tab 55 at page 1597.

The first line of the judgment that he rather rushed over said in terms:

"The reasons for a decision must be intelligible and they must be adequate."

Now, if anything, that points against any hard and fast distinction between reasons and the information necessary to understand them. If you don't provide the information that are necessary to make the reasons understandable, then ex hypothesi they are not going to be intelligent or adequate either.

So we say there is no hard and fast distinction between the reasons and the information, but in any event, in the present context, there is an express duty imposed on the group to decide upon what additional information is necessary to understand the reasons and the decisions and to then provide that information. The group personally must decide upon that information. It is not a delegable duty, in our submission.

My learned friend is wrong to suggest that that decision of the group would be only subject to a rationality challenge. This is a duty that goes to fairness and, therefore, the authorities make clear that that's not subject actually to

a Wednesbury test.

That in a sense is all by-the-by, because we are not challenging on the decision per se. What we say, and this is really a point that is not properly addressed by the other side, is that when one comes to the inclusion of information in the final decision in this case, there's no evidence that the group ever actually decided on what that information was.

The reason for that is because the way my learned friend now puts his case, is he says "Well, I know we have this full confidential version of the decision, but the real decision", he says, "it is just the published version". He pins his colours to that mast. He says the fully confidential version, the version we have all been referring to over the last four days is not a confidential version at all. It is just lots of information provided by the CMA.

Now, we find that a rather unreal submission, but the critical problem for the CMA in relation to this is that the only version of the decision that the group ever approved was the provisional fully confidential version. That contained a considerable amount of additional information beyond that that is contained in the public version they are referring to.

MR JUSTICE MARCUS SMITH: You said "provisional" a moment ago. You don't really mean provisional. You mean the last draft.

MR JOWELL: Last draft. Forgive me, Mr Chairman.

The point I make, for present purposes, is that if one compares that last draft that the group approved and one compares it with the published version that they say now is the decision, the published version has got effectively something like 40 pages missing from it that aren't in the version that the group approved. All of that additional information was excised. It wasn't excised by the group. It was, according to Mr McIntosh's first statement, paragraph 126 -- it seems to

have been excised by the CMA's case team.

Now, we don't know whether Mr McIntosh approved those excisions or not, and no doubt perhaps we will be told in yet further evidence, but the suggestion from his existing evidence is that it was purely the case team, the CMA's case team that decided on those excisions. But whether or not Mr McIntosh approved it or not, what is beyond any doubt and common ground is that the group never considered or approved those excisions.

Now, my learned friend's answer to this point was to say: "Ah, but the group knew which parts of the decision were marked 'confidential'".

That's just goes nowhere because not every matter that's marked "confidential" can be supposedly irrelevant to an understanding of the reasons for the decision. One has to come back to the group's duty. The group's duty is to give the decision, to give the reasons for the decision and to decide on what information is necessary to understand those reasons and the decision.

If this information is mentioned in the version they have approved, the only version they ever approved, it doesn't matter if it's marked "Confidential". In fact, if it is marked "Confidential" and it is also mentioned in the decision, the chances are it is going to be rather important, because after all why would one mention confidential information gratuitously? Everything they approved can, prima facie at least, be assumed to be information that's relevant to understanding their reasons and understanding the decisions.

So the prima facie position is that the confidential information also contained the group's reasons and the information needed to understand those reasons.

Now, the obligation that was on the group then was under section 244 was then to consider, to balance the various requirements under that section, including confidentiality and the need to provide information to understand their

reasons, and to then come to a view and say: "Well, what should be in the final version of the decision and what should be out of it?" But the group never did that, and the result is that one just can't have any confidence at all that the published version of the report contains all the information that the group considered necessary to understand its reasons or indeed all of its reasons.

For the avoidance of doubt, my learned friend said this was not a pleaded point yesterday. It is very much a pleaded point. It is on our notice of application at para 120 (f) (3) and indeed in our reply at paragraph 71.

So that's a rather fundamental problem for the lawfulness of this decision, that the group has never -- never mind the changes that were made -- the group never turned its mind to the excisions. They were made by someone else.

My learned friend did not dispute, I think, that in light of section 118 of the Act there is no general power to make excisions to a report under section 38. We say that's right and it is also consistent with the CMA's own guidance, some of which is cited in your judgment in Eurotunnel. But could I take you to the guidance itself? It is in volume 5 of the authorities bundle at tab 103.

If one goes to page 3850, you see 4.5. It refers to the considerations that the CC must consider in relation to disclosure of specified information in correspondence at hearings or in a disclosed document. Then it says:

"The Act does not contain specific provision for excisions from reports, save in some cases concerning public interest considerations."

JUSTICE MARCUS SMITH: Where are you reading, Mr Jowell?

MR JOWELL: Paragraph 4.5 at the top of the page.

MR JUSTICE MARCUS SMITH: I have it. Thank you.

MR JOWELL: It seems to be recognising there that there is no general power to

excise from reports.

If one goes to 3859, please, one sees, and this is quoted in your judgment in Eurotunnel, and cited with approval, is that the CMA goes on to explain the manner of disclosure of information. You see at 9.13 it notes that:

"There may be a number of options open to groups when considering the manner of disclosure."

Then we see in 9.14 the different ways of doing this. It says:

"Provision of ranges, provision of aggregated data, provision of aggregated summaries."

Then note (d):

"Excision of the confidential information from documents, for example of names, locations and data, when the information excised is not material to the CC's enquiries or its decision or where the excision does not affect the comprehension of the document for the reader concerned."

We say that in many cases the excisions have profoundly affected the comprehension of the document for the reader concerned. It notes in 9.15 that the first four methods will be the usual approaches to take.

MR JUSTICE MARCUS SMITH: This paragraph, though, is dealing with information, not the drafting of a decision.

MR JOWELL: It is. No, that's absolutely true. It might apply to the provisional report, effectively, the one on which it is consulted, one might say, conceivably. It is a bit unclear. But I quite agree it does not apply to reports and the general point about reports one sees.

MR JUSTICE MARCUS SMITH: Forgive me. I am just going to try to extract the propositions that I think you have just been making so that I have got them clear in my mind, because I think you are making three points. I just want to

ensure that I have got them on board clearly.

Point one, what I call the overkill point, is you say the fact that material is in the decision, whether it is the provisional decision or final decision, the fact that it is in there means that it matters.

MR JOWELL: Yes.

MR JUSTICE MARCUS SMITH: That's your first point.

The second point is that, I think irrespective of who makes or approves the redactions, the confidentiality protection, even if they were approved by the group, you can't say that because the excisions were approved by the group that the decision is anything other than the complete document. You might be able to say: "Yes, the group would have approved a decision differently framed". If you delete a sentence here or there, almost certainly they would have signed up to something different. But the fact is when you are saying their decision is something there --

MR JOWELL: Yes.

MR JUSTICE MARCUS SMITH: -- it is what was the complete version rather than anything else.

MR JOWELL: Yes.

MR JUSTICE MARCUS SMITH: One can't after the event say: "Well, we might have made a different decision". There is one decision.

MR JOWELL: Yes.

MR JUSTICE MARCUS SMITH: And that is it. So that I think is the second point that you are making.

MR JOWELL: Yes.

MR JUSTICE MARCUS SMITH: The third point is that there is a distinction to be drawn between a protection of confidentiality and an excision, and I think the

difference that you are drawing is that the confidentiality protection is something that is withheld from the public, for whatever reason.

MR JOWELL: Yes.

MR JUSTICE MARCUS SMITH: And may be withheld from the lay client in accordance with the confidentiality ring, but if it is not going in any way, shape or form to the subject of the enquiry, here Meta, then it is not a confidentiality protection. It is an excision. You say I think that that is something that you can't do.

MR JOWELL: Yes, I think that's right. It is important to note we have alternative versions of all of those points which we would also make. For example, in relation to the first point, where we say the fact that it is in the decision means that it therefore is relevant, one could have also an alternative version, which is that at least it is a very strong prima facie assumption that it is relevant, and if it is conceded to be relevant information, then clearly, if it is both relevant, conceded to be relevant and in the decision, then plainly it is something that had to be shown to the parties affected.

MR JUSTICE MARCUS SMITH: Mr Jowell, I absolutely understand that. Don't either of you get the sense that because I am trying to frame these points, I am agreeing with them. I completely understand that the thrust of Mr Jones' submissions is that you have got to constantly bear in mind the fact that this is a long document and what the CMA is doing is trying to be as helpful as possible in order to ensure that you know its thinking. It is therefore erring on the side of caution by being over-inclusive, and that therefore, one can't do what I have just framed, namely to say if it is in the decision, it is material, because that's actually misconstruing what the CMA is doing. I absolutely have that point in mind. I am trying to see where the battle lines are drawn.

I understand your battle lines are not unitary.

MR JOWELL: Indeed. We do say that they have to in any event give their reasons for the decisions and the information relevant to those reasons, and we say that that is an obligation that's on the group, and we say that it is an obligation that arises to give those reasons at the same time as the decision itself.

My learned friend took you to the Ermakov case, to the judgment. If I could take you briefly back to that, because it is important to have a little look at it. It is in authorities bundle 1, tab 28. It is at page 657.

MR JUSTICE MARCUS SMITH: One moment, Mr Jowell. We have a missing document.

PROFESSOR CUBBIN: My apologies. I put something back on the wrong shelf.

MR JOWELL: If one goes, please, to page 657 at tab 28, it is important to read the first sub-paragraph at (g) in the judgment of the Court of Appeal:

"It is unrealistic to seek to draw any significant distinction, in the context of section 64, between the decision and the communication of the decision with reasons or to treat the giving of reasons as purely procedural. In reaching this conclusion I am influenced by the fact that the section, in terms, requires reasons to be given at the same time as the decision is communicated by Mr Justice Schiemann's observations in Ex Parte Shield and by many cases in which such decisions have been quashed for inadequacy of reasons."

That's the same here. There is an obligation to give reasons for the decision at the same time as the decision, and indeed the information relevant to those reasons at the same time as the decision. Inadequacy in the reasons or indeed of the information is equally a basis to quash the decision.

My learned friend prayed in aid sub-paragraph 5 on the facing page, where the judge talks of:

"Nothing I have said is intended to call into question the propriety of the kind of exchanges sometimes leading to a further exposition of the Authority's reasons, or even to an agreement on their part to reconsider the application, which frequently follows the initial notification of rejection."

He doesn't want to discourage those.

He says:

"These are in no way to be discouraged, occurring as they do before, not after the commencing of proceedings. They will often make proceedings unnecessary. They are, in my judgment, very different from what happened in this case."

My learned friend sought to somehow suggest that the supplemental provision of reasons after the statutory deadline in this case was somehow comparable to that, but it is very clear that only applies to matters before the commencement of proceedings. So the provision of the full confidential version of this decision was only provided after we had commenced proceedings. Also, it is clear it is all about attempts in some cases to get the authority in question to change its mind, but that's simply not a possibility in this statutory context.

The affected parties have a right of challenge, within a strict time limit, after the decision is handed down. There's an obligation to impose a remedy, within a strict period, consistently with the report, and there's only a statutory basis to change the remedy in defined and restricted circumstances. So the notion that there's some sort of room in this statutory context for informal reconsideration, which is what the judge is talking about, is just completely off the point.

All of the reasons and all of the information relevant to those decisions must be given with the decision, and at the same time in the statutory context, and that's clear, in our respectful submission.

My learned friend sought to draw a distinction between, on the one hand, decision-making, which he accepted was non-delegable, and then other tasks in which he included giving reasons for the decisions or giving information necessary for those reasons. He said that that is somehow different.

Well, there can be no such distinction drawn under the statute, because section 34 (c) (i), which I have shown you, of the Enterprise act, expressly displaces the default position under the statute that the functions of the CMA are exercisable on behalf of the CMA Board, and it stipulates that a number of specific, clearly identified statutory functions are to be carried out by members of the group as constituted by the CMA. That includes all of sections 35 through to section 41B, with certain provisions which are carved out.

There is no statutory basis to make some sort of distinction between the different functions under section 35 that the group must carry out and the functions that it carries out under section 38, in preparing and publishing the report.

When it comes to section 38, one sees that in all of the cases, whether it is making a decision or giving reasons or deciding on the information relevant to those reasons, in all of those cases what you are doing as a group is discharging statutory powers or statutory duties or statutory functions under the Act.

If one goes back to the McKee case that I took you to in volume 5 of the authorities bundle, at tab 88, at 3150, please, you will see in paragraph 44 what is identified. Do you see in the final sentence:

"We can identify nothing in the statute or the wider canvas to confound the analysis that the scheme of the Act is that the role of the Commission is to make all of the decisions required in the exercise and discharge of the statutory powers, duties and functions, while that of its staff is one of research, information gathering, briefing, advice and recommendation."

So what is non-delegable is the discharge of the statutory powers, duties and functions. The only exception to that you will see at the beginning of the paragraph, is where there is an inevitability that the statutory function in question has to be delegated to somebody else.

It is common ground, as my learned friend conceded in response to a question from Mr Holmes of the Tribunal, there is no practical impediment to the group approving at the end of the process the final draft of the report. There's nothing that prevents them doing that whatsoever.

Indeed, given that, as my learned friend submitted many times, it is the CMA staff that write the report, that draft the report, it is actually even more essential that it should be the group that approves the final draft and not some prior draft. That is how it carries out its core statutory function.

Mr Jones invited you to adopt a very woolly and unsatisfactory test of asking whether the group had sufficient involvement in the process to have confidence that it was the group's report, having regard to a degree of involvement in its genesis. That's what he said

We say that sort of vague approach is just incapable of rigorous application or indeed review by this Tribunal. It is no more than a disguised appeal to practicability and administrative convenience over what the statute plainly requires, and it plainly required them to approve, we say, the whole of the report.

When we come into private session, which I would like to do next, I will show you that he is decidedly wrong to suggest that the changes were merely cut and paste. They were not.

If I could, Mr Chairman, I would like now to move to private session. I don't know if we could do an extra fifteen minutes now or ... I am in your hands. I am

happy to keep going if it is convenient. If everyone is hungry, I am happy to stop.

MR JUSTICE MARCUS SMITH: I don't want you to take anything out of order, but are you going to address us on the points that Mr Jones started on, which was the criminal consequences of getting protection of confidentiality wrong?

MR JOWELL: The only point we would make at the present time is that there's no instance in recorded history where, in the exercise of their statutory functions, the CMA, as a body, has ever been -- any suggestion that they would be criminally liable in practice for in good faith seeking to carry out their functions under the Act.

We may need to go into private session, Mr Chairman.

MR JUSTICE MARCUS SMITH: Very good. In that case if we could switch off the live stream, put a note on the door that we are now sitting in private, and if I could ask those who are not within the ring to leave. Could you please do so now. Thank you.

(Hearing continued in private session)

(IN PUBLIC SESSION)

Submissions on ground 5 by APPLICANT

MR JOWELL: If I may invite the Tribunal to take up volume 1 of the authorities bundle, please, and go back to the Enterprise Act at tab 5, page 59.

MR JUSTICE MARCUS SMITH: Yes.

MR JOWELL: You will see there this is the duty under section 41 to remedy the effect of completed or anticipated mergers:

"Under section 41 (2) the CMA is permitted to take such action under 82 or 84 as it considers to be reasonable or practical to remedy, mitigate or prevent the substantial building of competition concerned and to remedy, mitigate or

prevent any adverse effects which have resulted from or may be expected to result from the substantial lessening of competition."

So the action that is permitted is, of course, that which has to be linked to the substantial lessening of competition. It has to be directly causally connected to it. The action that is taken by the CMA pursuant to this section and pursuant to 82 and 84 cannot be to improve competition in the relevant market generally. It can't be to bolster the position of challenger undertakings or to seek to create more competition than would have existed, even absent the merger. The CMA is only entitled to remedy or mitigate the SLC's themselves or their adverse effects.

Another important constraint, of course, on the remedies is the requirement to comply with article 1, protocol 1, and hence with the principle of proportionality, and a remedy will be disproportionate if there's a less intrusive but equally effective alternative remedy. You will see the authority, which I am sure will be familiar to the Tribunal, cited in our notice of application, paragraphs 121 to 122. None of this I understand to be in dispute.

The report maintains that the remedies it has proposed, which it calls its divestiture remedy as a whole, would be effective and proportionate for either the vertical SLC or horizontal SLC independently.

If I can show you that, it is in the report at page 933 of volume 2. It is paragraph 11.326. You see what they say there:

"As a result we have concluded that the divestiture of GIPHY is both an effective and proportionate remedy to the SLC we have found when considered both individually and in combination."

Now, there are two parts of our ground 5. The second part I have in effect already dealt with. I will come back to explain how it fits in in a moment, but the first

part is that we say that even a moment's reflection shows that that assertion in 11.326 cannot possibly be correct, because the CMA has simply not considered whether to remedy the vertical SLC in isolation, the full suite of what it calls its divestiture of GIPHY is, in fact, required.

We say, insofar as the report has considered that and come to the conclusion that it would be necessary, it is a manifestly disproportionate and irrational response to the vertical SLC on its own.

If I could invite you to go back to page 891 of the report to see what I mean by "the full suite of divestiture remedies", you will see in 11.137 they say:

"We have concluded that:

(a) a divestment should comprise the sale of all the share capital of GIPHY and include as a starting point all the assets and associated IP that were acquired by Facebook as part of the merger. That includes all the assets that were transferred to Facebook and those that remain within GIPHY."

Now, that part of the remedy we don't take independent issue with as a response to the vertical SLC. That's the sale part. But everything else that you see from (b) to (f) is all about reconstitution of the revenue function of GIPHY, of its Paid Alignment business.

You see in (b):

"The parties should seek to ensure that GIPHY is divested with complete management team and staff roster. The management and staff should be given sufficient incentives to transfer on to GIPHY contracts.

(c). They should present a coherent and worked up revenue strategy to a potential purchaser.

(d). There should be sufficient cash on the balance sheet to enable it to complete effectively post divestiture.

(e) Traditional back office services to continue to be provided; and

(f) A short-term agreement with Facebook for supply of GIPHY's products and access to GIFs."

All of that is aimed at seeking to ensure that GIPHY can get back into the market as a supplier of Paid Alignment advertising.

We can see, as I have said, a plausible case at least why (a) might be required to remedy the vertical SLC as found in the decision. I will come back to whether (a) is, in fact, necessary. That's the second part of ground 5, but we can't see any plausible argument as to why (b) to (f), all about reconstitution of the revenue function would have any connection to the vertical SLC, which is all about input foreclosure. It is the concern that other competing media companies may be cut off from obtaining GIFs or GIF stickers by Meta.

Whilst one can see that the obligation to sell GIPHY and its assets to a third party might be connected to the vertical SLC alone, one can't begin to see why it would be necessary to ensure that the purchaser had an intention to continue to supply Paid Alignment advertising, for example.

So our point is a very simple one and we make it in clear terms in our notice of application at paragraph 124.

We say, for example, if Meta sold GIPHY and all its assets to another large company, with no incentive to foreclose, such as -- and I just choose names of large companies randomly -- Amazon, Apple, Disney, they would be liable to continue to provide GIPHY's GIFs to all of Meta's social media competitors, and that would then fix the vertical SLC, and there would be no basis additionally to require Meta to spend tens or even hundreds of millions of dollars reconstituting the Paid Alignment business, which was historically, as you have seen, a loss-making business, in order to do something to remedy

the vertical SLC. It would be fully remedied.

So the obvious truth we say is that the respondent just failed to turn its mind to what the precise remedy should be, if it was only concerned with the vertical SLC and not the horizontal SLC.

We actually find it rather surprising that the CMA has not just conceded this point, because it seems really a rather obvious one, with respect, to us, but indeed what they have sought to do is to find reasons as to why reconstitution would also be necessary -- when I say "reconstitution" I mean reconstitution of the revenue function and the advertising function -- would be necessary for the vertical SLC on its own.

They have had a number of different attempts to come up with these arguments. The first is in the defence. If I could invite you to look at that, it is in volume 1 on page 203, paragraph 158(d). They say:

"In particular and contrary to Meta's suggestion in Notice of Application 124, GIPHY's ability to independently supply GIFs on an enduring and sustainable basis post divestment is self-evidently dependent on it being able to generate revenue."

They refer to the need to restore GIPHY's revenue in order to enable it to compete effectively in the future as a supplier of GIFs.

Well, one should always beware of the phrase "self-evidently" in litigation. It is, with respect, not only not self-evidently the case, it is self-evidently not the case that GIPHY's ability to independently supply GIFs on an enduring and sustainable basis is dependent on it being able to generate revenue, still less revenue in the form of Paid Alignment Advertising.

Tenor does not generate revenue in this way. Gfycat does not generate in this way. They are ostensibly enduring and sustainable suppliers of GIFs. The reason

they are is because they are owned by very large companies that are willing to fund their GIF supplying activity, and there may be all sorts of different way that companies, as I said, like Amazon, Apple or Disney, whosoever, may choose to monetise in the future or not monetise GIPHY's GIFs, but it certainly doesn't have to be through Paid Alignment, and they could choose simply to subsidise it, for all sorts of reasons as well.

So the CMA is not entitled, in our submission, by using the word "self-evidently" to introduce new evidence that is not in its decision as a justification for what was really just an oversight and certainly not to introduce misguided evidence of this type.

The passages that you see and the decision that are then cited are clearly dealing, which you see in (d) below, with the need for GIPHY to have its revenue function in order to compete, and that's all to do with the horizontal SLC, but it doesn't have in mind competition in the supply of GIFs. What it is is competition in the advertising field where the revenue is being generated.

If one goes to their skeleton argument, and you don't need to take it up, they take a different tack and they say two things. In paragraph 97 they say:

"We take an overly simplistic view of the CMA's foreclosure concerns."

The thrust of what they say is they are concerned not just with disadvantages that Meta might impose on its rivals from potentially keeping GIPHY all to itself. They say:

"We are also concerned with the future advantages that competitors to Meta might gain if GIPHY continues in business and if they innovate in the future."

We will come in a moment to whether that's a proper reading of the report. We say it is not. When one comes to foreclosure, it is very clear what's meant. Let's take the short answer to that. Let's suppose for a moment that the CMA are

correct and that they are concerned also that GIPHY's GIFs should continue to be supplied to everyone, regardless, not just that Facebook shouldn't have them and others not.

That doesn't actually meet our central argument, because our central argument, as I have just explained to the Tribunal, is that it suffices to sell GIPHY to a third party, at least one that is prepared to give an assurance that it intends to keep GIPHY going and keep supplying GIFs. That meets the entire objection. One does not need -- at very most that would justify an obligation to sell to a third party that had sufficient funds and an intention to keep GIPHY going and to keep GIPHY supplying GIFs. There's certainly no need to insert into the remedy for the vertical SLC the reconstitution of GIPHY's entire revenue function and its Paid Alignment advertising.

It is just not realistic to suppose that an Amazon, Apple or Disney would require the advertising revenue arm of GIPHY to ensure that it would keep supplying GIPHY's GIFs.

The second argument of the CMA in its skeleton argument -- one sees this in paragraph 102, and again I don't intend to take it up -- but what they say is it seeks to represent the argument as being all along that effectively they say this was a remedy intended to minimise what the call composition risk, which they say includes the risk that the divestiture package might be too narrowly constrained to attract a suitable purchaser, or that it doesn't allow a purchaser to operate as an effective competitor.

If one could go, please, to the decision in volume 2 at 862, we see there that composition risk is defined in 11.15 (a) and it is described as:

"The risk that the divestiture package is too narrowly constrained or not appropriately configured to attract a suitable purchaser, or does not allow a purchaser to

operate as an effective competitor. The scope of the divestiture package is designed accordingly."

We see in 11.17 (b) we see what they say. They say:

"In considering the appropriate scope for a divestiture package, we should ensure that it:

(b) would enable the eventual purchaser to operate the divested business as an effective competitor, that is to say one that could comprehensively remedy the SLCs we have found."

The point I would make is that is SLCs plural. It is based on composition risk relating to both of the SLCs jointly. Now, if they had considered the vertical SLC in isolation, it is obvious that they would have seen the composition risk very differently, because what is the suitable purchaser and what it means to be an effective competitor differs as between the two SLCs. When it comes to the horizontal SLC, one can see, of course, it matters that the revenue business will be pursued, but that just cannot matter for the vertical SLC. For the vertical SLC all you need is a purchaser at the most that has the funds and the commitment to continue supplying GIFs.

If you attach to the sale process all of these multiple mandatory requirements related to the pursuit of the revenue function, that will only be liable to make your divestiture less effective, because it is going to be much more difficult to attract a suitable purchaser than if you just sell the core business.

That's our really short answer to this point. It is very clear, in our view, they have not turned their minds to this. it is common sense really.

I should just also say, out of completeness, that the CMA are actually wrong to suggest that the vertical SLC, as found in the report, is concerned with more than the risk of Facebook, as it was then called, foreclosing its rivals' access

to GIPHY while maintaining its own access. That is all it was concerned with. It wasn't also concerned about the risk of Facebook terminating GIPHY altogether and thereby damaging competition in the market for social media services.

I should just briefly take you through to make that good, because in a sense it is the longer answer, but it is also a complete answer.

Now, if one goes in the report to 10.2(b), which you will see at page 858, you will see the vertical SLC conclusion is that "Substantial lessening of competition" 10.2(b) is:

"In a supply of social media services worldwide, including in the UK, due to vertical effects resulting from input foreclosure."

Now, input foreclosure is a term of art. It is defined in the CMA's merger guidance, which you see in authorities volume 6, tab 106, page 4131. It defines it at 7.8 (a):

"Input foreclosure. Where a merger involves one party that supplies an input to rivals of the other party, the merged entity may restrict these rivals access to this input or offer it on worse terms, directly harming the rival's competitors and therefore competition in the downstream market."

So it is assumed that it's the one party that is supplying the input to the other, and in this case that's Meta supplying GIFs to its rivals.

If one goes back to the report, one sees that the mechanisms of foreclosure are described on page 769. You see paragraph 8.10. You see:

"In this case we consider that Facebook could adopt a range of mechanisms to foreclose its rivals, including total foreclosure by refusing to supply GIPHY's GIFs to rival platforms or partial disclosure by degrading the quality of GIPHY's services to rivals."

So there's nothing there about closing down access to GIPHY's GIFs altogether for everyone. It is all about denying it to others.

The CMA also refers to 8.131 at 8.140. I should briefly take you to those passages. It is page 813 of the report. Forgive me, it is page 811. If one starts, you see:

"Having GIPHY's GIFs as an input to innovation of new features by social media platforms".

These are the paragraphs that the CMA relies on for its theory that they are concerned about the total, effectively, the destruction of GIPHY, but they don't actually, when you read them carefully, they don't actually suggest that.

Look, for example, at 8.135 on page 812:

"Given the above, we expect that access to GIFs is not only important for user engagement in the shorter term, but also as an input for innovation and strategic development of platforms. By gaining control of a popular user feature expression and its future development, Facebook reduces the likelihood of its competitors developing innovation that may strengthen."

We say the words "its future development" suggest that it is understood that Facebook will be retaining control of this.

If we go to 8.156, on page 819, we see the effect of foreclosure on competition. If you go forward to 8.161 on page 822, we see this includes the competitive harms identified by the CMA. The important point is this. Each of these harms arises if Facebook could foreclose its rivals from GIPHY. By foreclosing is rivals from GIPHY, Facebook could -- and it is all linked to Facebook foreclosing its rivals from GIPHY, as opposed to all social media platforms, including Facebook, being denied access to GIPHY.

You see that in 8.162 very clearly, where it talks -- over the page, on 823 you can see the penultimate sentence of the paragraph:

"In other words, Facebook's rivals in social media would no longer have access to the same opportunities as Facebook, with regard to developing their own GIF-related innovations, which will lessen their ability to compete."

It is clear from that that it is a comparative exercise, Facebook holding on to it and the others not having it. That's the basis of their input foreclosure theory.

In a sense, none of what I have just taken you through really matters, because the short point is this. Even if there is a basis in the report to suggest that the vertical SLC would arise from access to GIPHY's GIFs vanishing for everyone, including Meta, there are perfectly adequate and less restrictive alternative remedies to ensure that GIPHY's services of supplying GIFs would survive, which wouldn't involve the unnecessary and intrusive and extensive reconstitution remedies that are imposed by the CMA and that are seeking to resurrect its deceased advertising arm.

So that's the first point on our ground 5.

The second aspect of ground 5 goes to remedy A, which is the actual sale remedy. You have already heard me on that because you have already heard my submissions to the effect that this would also be a disproportionate and irrational remedy because no consideration has been given to the likely duration of the vertical SLC.

The duration of the vertical SLC was obviously an important factor in the decision, because if the vertical SLC was not likely to persist beyond five years, then that would be a highly important consideration when considering the proportionality of any sale remedy.

Of course we don't say it is necessarily the decisive factor. We don't say that. Not necessarily the decisive factor, but clearly highly important factor, and Snap's acquisition of Gfycat and the additional information that I can't refer to openly

is highly important to that.

So that is what we say in relation to ground 5. Unless there are any questions from the Tribunal, those are my submissions.

MR JUSTICE MARCUS SMITH: Thank you, Mr Jowell. Mr Jones.

Submissions on ground 5 by RESPONDENT

MR JONES: Sir, could I please go back to authorities volume 1? I am going to start again with the statute.

MR JUSTICE MARCUS SMITH: Yes.

MR JONES: Section 35. I will do this quickly because I know you are familiar with it and Mr Jowell has taken you through, but just to make sure I pick up on all the relevant points. 35 (3), you have seen these are the questions to be decided, and it is in the context of these questions that the group has to decide whether action should be taken, and, if so, what action for the purpose of remedying, mitigating or preventing the SLC. At (4):

"In deciding the questions mentioned in sub-section (3), the CMA shall in particular have regard to the need to achieve as comprehensible a solution as is reasonable and practicable to the SLC."

So there is an emphasis on achieving a comprehensive solution.

Section 41, Mr Jowell referred you to. You will have seen that within that there is a cross-reference to section 82 or 84. What one does under section 41 is take action under section 82 or 84. You then need to look forward to those. I am only doing this to make sure we join all the dots together in the Act. It is quite an oppressive process.

84 is final orders. This is on page 65. You get from that that final orders and such supplementary, consequential or incidental provision as the CMA considers

appropriate.

So it's a winding route, but you end up eventually in schedule 8, which is at page 101 of this bundle.

To be clear, as far as I understand it, there isn't any argument about whether the remedies in this case fall within schedule 8. They do fall within schedule 8. The argument is really a rationality argument whether the CMA's judgment that these should be imposed was rational.

The reason I say rationality is that you will recall that in BAA the Tribunal said that when you come to these proportionality questions, even under A1 P1, given that the review by this Tribunal is manifestly without reasonable foundation, it means essentially the same thing as a domestic rationality standard. So that's the territory that we are in.

The particular paragraphs under the schedule, just for your note, you will see at paragraph 2:

"An order may require any party to an agreement to terminate the agreement."

Then, at 13:

"The order may provide for the division of any business."

Further down there are various other provisions which can being included, such as the transfer or creation of property rights, liabilities or obligations, the number of persons to whom property rights, liabilities or obligations are to be transferred, the adjustment of contracts and so on and so forth.

There are these very wide-ranging powers in schedule 8 of the Act.

Could I then turn, please, to the major assessment guidelines at authorities 5, tab 104.

Now, sir, these are relevant both to ground 5 and ground 6. To avoid going through it twice, I am going to go through it once now, and some of the points

I highlight will be relevant more to ground 6 than ground 5.

You will note on page 3872 there is a section.

MR JUSTICE MARCUS SMITH: 3872? Am I in the wrong bundle?

MR JONES: Authorities bundle 5.

MR SIMON HOLMES: Which paragraph?

MR JONES: Tab 104. I was going to look at the heading. It is page 3872, which is paragraph 3, section 3, sir.

MR JUSTICE MARCUS SMITH: Thank you.

MR JONES: There's a discussion of firstly the purpose and principles of remedial action. Just to situate us on the points I am going to make, you will see there is a heading "Objectives of remedial action", and then over the page various factors which go into that. The first one is effectiveness. This is important, obviously. The remedy has to be effective. So:

"The CMA will assess the effectiveness of remedies in addressing the SLC and resulting adverse effects before going on to consider the costs likely to be incurred by the remedies. Assessing the effectiveness of a remedy will involve several distinct dimensions."

(a) Impact on SLC and resulting adverse effects.

The CMA views competition as a dynamic process of rivalry between firms seeking to win customers' business over time. Restoring this process of rivalry through structural remedies, such as divestitures, which re-establish the structure of the market expected in the absence of the merger, should be expected to address the adverse effects at source. Such remedies are normally preferable to measures that seek to regulate the ongoing behaviour of the merger parties (so-called behavioural remedies). Behavioural remedies are unlikely to deal with an SLC and its adverse effects as comprehensively

as structural remedies and may result in distortions when compared to the competition market outcome."

Then it goes on at (b) to talk about the appropriate duration and timing that:

"The remedies seem to address the SLC effectively throughout as the expected duration."

You will see just at the end of that paragraph that:

"That may be relevant where the SLC may last for a long term or whether timing of the effect is uncertain."

So where there is uncertainty, that can be an important factor in the choice of remedy:

"(c) Practicability."

The point being made in this paragraph is that essentially behavioural remedies which regulate ongoing behaviour are generally subject to the disadvantage of requiring ongoing monitoring compliance activity.

Then at (d), whether they have an acceptable risk profile. In the middle of that:

"In evaluating the effectiveness of remedies, the CMA will seek remedies that have a high degree of certainty of achieving their intended effect."

There's then a discussion on the costs of remedies and questions of proportionality.

Could I turn forwards to the next section, which is 3880, "Choice of Remedies". Over the page you will see "Divestiture". At 3.37:

"The aim of divestiture is to address an SLC through the disposal of a business or assets from the merger parties, to create a new source of competition if sold to a new market participant or to strengthen an existing source of competition if sold to an existing participant. A successful divestiture will effectively address at source the loss of rivalry resulting from the merger by changing or restoring the structure of the market."

So there's repeated emphasis on restoring the structure of the market pre-merger. You will see down that page there's a section on "enabling measures":

"Certain forms of behavioural remedies operate principally to enable competition by removing obstacles to competition."

Over the page at 342:

"A key question in evaluating the expected effectiveness of enabling measures is whether the response to these measures is likely to be of sufficient scale and timeliness to restore adequately the rivalry lost as a result of the merger. Enabling measures are likely to require ongoing intervention and monitoring and in some instances this may involve highly complex issues."

The design and implementation of behavioural remedies is considered in chapter 7.

On the next page, at 346, you will see the CMA prefers structural remedies. I won't go through it because it is essentially the points I have just touched on. It explains very clearly why it prefers remedies such as divestiture or prohibition over behavioural remedies.

The divestiture risks are addressed in chapter 5. So if I can just look at that. It is 3905, please.

MR JUSTICE MARCUS SMITH: You have not said very much about the statements of the Interveners, but one of the points that is made by one of the Intervenors is international comity and extraterritoriality, which you quite rightly have not addressed, because we have written submissions, but in the selection of remedies does the extraterritoriality point feature, in the sense that I see that in 355 there is reference to international constraints? Now, no-one is suggesting there was not jurisdiction to make the remediation, but is it being said that one ought to take account of the fact that this is a merger between two foreign corporations whose only presence in this jurisdiction is the

online presence, in deciding what is the appropriate remedy, or is that simply a factor that one should disregard when considering the appropriate remedy to impose?

MR JONES: Well, it's relevant in various respects. Comity, of course, is not by itself separately relevant at this stage. So you have that point.

MR JUSTICE MARCUS SMITH: Indeed.

MR JONES: If one then puts that to one side and questions of comity are put to one side, one has to meet the jurisdictional test. I think that's what's referred to in 3.55. You come back to it to consider it there. You may also consider it because there may be other foreign competition authorities who are considering similar action, and, as you see in 3.56, there may then be a need to consult with them to ensure that there is essentially coordinated action or that you are not doing things which can cut across each other. So it could come in in that way in a particular case, very much so.

I suppose, sir, it could be relevant to the broader questions of practicability and so on to know where someone is based and where they are operating. So I would not want to rule it out as being relevant in any of those ways either. So that's why I say potentially it could come in at this stage.

Then, sir, the divestiture remedies, so 3905. Paragraph 5.3 says:

"Divestitures may be subject to risk that may limit their effectiveness in addressing an SLC. It is helpful to distinguish between three broad categories of risk."

You have seen these. Just to run through them, there is composition risk:

"The risk that the scope of the divestiture package may be too constrained or not appropriately configured to attract a suitable purchaser, or may not allow a purchaser to operate as an effective competitor in the market."

To put it shortly, you need to put together a divestiture package that's going to be

attractive to purchasers. Mr Jowell has thrown out some names of entities who he says might be interested in buying GIPHY, but he has handpicked a small number of enormous companies that might conceivably want to buy something without revenue raising opportunities. I am going to come back to that in due course. The CMA is not, when thinking about putting together a divestiture package, it is not thinking "Here are two or three enormous global companies that might have an interest". It is thinking generally: "How can we put together a package that's going to appeal to the market and people that might want to buy this?"

So the package needs to address that risk, the composition risk. It is a similar one to the purchaser risk. These are risks that a suitable purchaser is not available or that the merger parties will view as a weak or inappropriate purchaser. And then asset risks, that the assets might deteriorate before completion of the divestiture.

You will see in 5.6 the starting point is divestiture of all or part of the acquired business. This is because restoration of the pre-merger situation in the market, subject to an SLC, would generally represent a straightforward remedy. That is also why, in 5.7, in defining the scope of a divestiture package that will satisfactory address the SLC, the CMA will normally seek to identify the smallest viable standalone business that can compete successfully on an ongoing basis, and that includes all the relevant operations pertinent to the area of competitive overlap.

Essentially I think the same point is repeated at 5.12.

One final point which is relevant only to ground 6, but, as I say, I will just pick it up while we are here. 3909. There is a heading "Suitable Purchasers". At 5.21, it says:

"The CMA will wish to satisfy itself that a prospective purchaser is independent of the merger parties, has the necessary capability to compete, is committed to competing in the relevant market", and that's what I am emphasising, "and the divestiture to the purchaser will not create further competition concerns."

So commitment is picked up again at (d) at the bottom:

"The CMA will wish to satisfy itself that the purchaser has an appropriate business plan and objectives for competing in the relevant market, and that the purchaser has the incentive and intention to maintain and operate the relevant business as part of a viable and active business in competition with the merged party and other competitors in the relevant market."

On a broad level, one can see that there are advantages to a structural remedy which, in broad terms, seeks to restore the market to the pre-merger conditions of competition, but it is also, of course, true that one often cannot simply resolve the problem by requiring divestiture without more.

Pre-merger, GIPHY was a business with, among other things, a revenue stream coming from its Paid Alignment business, a team of people working on raising revenue, and established relationships with customers interested in its services. It now has none of that.

One can quite simply see therefore why, if it was simply sold in its current form, there would be all sorts of risks. One risk might be you wouldn't find a purchaser. One risk might be the purchaser would not be able to get it back on its feet and restore pre-merger conditions. So that in a nutshell is why something more was needed.

Can I turn then to the decision, please, starting at the start of chapter 11, page 859? Mr Jowell took you to a few paragraphs in this. I want to just give you a bit of an overview, because this is you will see a very large part actually of the

decision which we have only really had to look at very briefly so far.

If one looks, firstly, at 11.5, there is a discussion of the legislative framework and I think the guidelines as well. So in essence what I have just shown you is summarised in those few paragraphs there.

11.14 makes the point that:

"To be effective in restoring or maintaining rivalry, a divestiture remedy will involve the sale of an appropriate divestiture package to a suitable purchaser through an effective process."

The three relevant considerations are set out there.

11.15 is emphasising composition risk, purchaser risk and asset risk. You will see at 11.16:

"We consider each of these three risks throughout this section in our assessment of the effectiveness of the full divestment of GIPHY."

So those are considerations which run through the rest of the chapter and its consideration.

11.17 is about the scope and composition:

"(a) It needs to be sufficiently broad in scope to address all aspects of the SLCs.

(b) Would enable the eventual purchaser to operate the divested business as an effective competitor, i.e. one that can comprehensively remedy the SLCs that we have found."

Mr Jowell, I think, emphasised this to you, but it is right. It needs to remedy both SLCs. I will come on to show you that the CMA found that this was required just for the vertical SLC, but clearly it needs to remedy the vertical SLC. That's within (b).

Then (c) is also important, over the page:

"Is sufficiently attractive to potential purchasers."

At 11.21:

"In considering these issues, we take into account that as a consequence of the merger and Facebook's subsequent actions, GIPHY is in a significantly weaker position than it was pre-merger. GIPHY's revenue generating activities were terminated as a result of the merger. as rivalry enhancing result of the merger. Almost all of its employees were transferred to Facebook employment contracts, which included significant long-term incentive payments, and the cash on its balance sheet was returned to shareholders."

You see in the next paragraph:

"These actions mean the CMA is not able to implement its preferred approach to the divestment remedies."

So that was the challenge which was faced. Further down this page there is the heading discussing some overarching composition issues. They talk firstly about the financial viability of GIPHY.

Then, if you pick it up in paragraph 11.30, we are turning here to reconstitution of the GIPHY business. So this is trying to put the business back together. Could I just invite you to read, because it is highlighted "Confidential", 11.30 to see what Facebook were saying about this?

MR JUSTICE MARCUS SMITH: Yes.

MR JONES: The CMA's assessment then on this important question of reconstituting the business starts from 11.38. That paragraph makes the point that:

"Restoring the process of rivalry through structural remedies to restore the structure of the market should be expected to address the adverse effects at source."

So that's, if you like, the starting point. We are going to try to re-establish the structure of the market.

11:39 emphasises that:

"The guidance as the starting point will be divestiture of all or part of the business. That is because restoration of the pre-merger situation will generally represent a straightforward remedy."

11.40 cites the bit about having the smallest viable standalone business that can compete successfully. They say:

"We have taken into account the parties' submissions on the financial viability of GIPHY above, and consider that pre-merger GIPHY was capable of continuing to operate as an independent competitor, in line with our counterfactual. We consider, however, that due to the actions of Facebook immediately before and after the merger, simply adding back a revenue function and putting a similar level of cash on the balance sheet immediately pre-merger would not return GIPHY to its pre-merger position, and thereby recreate the dynamic nature of competition that existed pre-merger."

So there are other things that are required and that's what 11.43 goes on to discuss.

That is why the divestiture package is all of those things which one sees summarised at 11.49.

The next 40 or so pages of the decision are involved in going through each of those one by one and I will have to come back to some of those under ground 6, but that all then leads to the conclusion that Mr Jowell took you to at 11.137, which you are familiar with, which is where the various parts of the divestment package are set out.

Could I please pick it up again on internal page 426, page 907, paragraph 11.204. This is what Facebook's remedy options were. You will see at 11.204 they suggested three remedies, and the one which was to address the vertical theory of harm was the open access remedy. You will see a fuller description

of the open access remedy at 11.206:

"They propose that for a period of 5 years Facebook would undertake to maintain access to GIPHY's library under the same terms and conditions as pre-merger."

So that was their proposal. I will have to come back to some of the detail of the discussion of that proposal shortly, but if we just look firstly at the conclusions on page 927, 11.293:

"The SLCs which we found don't have the characteristics that the CMA merger remedies guidance would suggest make behavioural remedies suitable in principle."

So they are rejecting the behavioural remedies:

"Each SLC we have found is dynamic in nature and enduring, further reducing the likelihood that even the best designed behavioural remedy would provide an effective comprehensive solution. In addition, we found a number of serious deficiencies and effectiveness risks in Facebook's proposed remedy options, both individually and in combination and, accordingly, based on the analysis set out above, we have concluded that Facebook's proposed remedy options, open access remedy and the others, would not be effective, either individually or in combination in remedying either of the SLCs we have found."

Those are in essence the reasons why one then gets to the conclusion at 11.326 and 327.

326, of course, is where they say the divestiture is effective and proportionate to both of the SLCs, whether individually or in combination.

Now we need to go back into this reasoning in a bit more detail.

Just to make one point very quickly. The reason I am showing you some of the discussion of the behavioural remedies is because it is in that section we will

get into in a moment where there are some of the answers to Mr Jowell's points. The reason for that is that the CMA was responding to the way Facebook had put the points to it during this process. That's just by way of marker in case you were wondering why I am paying any attention to those. We will need to go to them in a bit more detail.

Mr Jowell's case, in summary, is given the CMA's vertical input concern, is that Facebook might foreclose rivals from GIPHY, that concern could be completely addressed by a simple divestiture order, and there is no need, it is said, to have the various additional requirements which are intended to ensure the survival of GIPHY's business and the generation of revenue in order to ensure the survival of the business.

As you have heard from Mr Jowell, the reason for that is that they say: "As long as Facebook can't take the benefit and deprive others, there won't be foreclosure. Facebook will not be foreclosing others, as long as there is not a situation where Facebook has it and can prevent others from having it or worsen the conditions of access."

Indeed, the reply takes the argument to its logical conclusion. They say in the Reply: Imagine in the extreme that GIPHY were to go out of business altogether and stop supplying services to any social media service, that would not involve foreclosure, they say, because Facebook would not be foreclosing anybody else. That is paragraph 78.

I think Mr Jowell effectively made that submission to you today as well. But the answer to it is that it doesn't properly capture the CMA's vertical concerns.

One can entirely see, standing back, that if you were only worried about the possibility that an acquiring undertaking would get the benefit of a service while preventing others from having it, if that was the complete limit of your

concern, then you might well say all we need to do is simple divestment and that will solve the problem. But, as you saw in one of the paragraphs I just showed you, the CMA, even in the vertical context, had more dynamic competition concerns than that.

If I can just show you how this point was described in the decision in chapter 8. If we turn, please, to page 819, so we are back in the vertical SLC chapter. There is the heading Mr Jowell showed you: "The effect of foreclosure on competition". Then you will see there is this quite interesting point at 8.158:

"The parties argued that the impact of an attempt to foreclose Facebook's rivals can be quantified, and proposed a formula whereby the expected loss of engagement by a rival is estimated as a function of the share of content affected, the expected change in quality given a switch to another provider and, three, the resulting degree of switching away from the affected platform."

So the parties were saying: "If you are trying to estimate, essentially, Facebook's incentives to foreclose, you can sort of come up with a model which quantifies foreclosure". What that model is based on is quite a simple view of foreclosure.

What the CMA says in response is very important, because it is where it is perhaps most clearly set out that that is not the CMA's view of foreclosure or it is not the full extent of it.

They say, in answer:

"As set out in paragraphs 8.145 to 147 above, we consider that a qualitative approach for assessing the incentives for foreclosure is more appropriate in this case, due to the significant network effects, differentiation and dynamic nature of this market. For the same reasons, we also consider that foreclosure effects in this case need to be assessed qualitatively and that the

parties' proposed analysis of foreclosure is overly simplistic, and does not reflect the way social media services are consumed and the way platforms compete for user attention. In particular (a), the methodology assumes that the harm to the foreclosed platforms' competitiveness can be quantified as the proportion of contents switched. However, social media platforms are ever evolving, and, as set out above, we consider that Facebook's control of GIPHY gives it another tool to disadvantage its existing or emerging rivals in social media, such that rival platforms would not just lose some content in the shorter term, but may be less able to innovate and compete in the longer term."

That's absolutely crucial to the CMA's view of this, which is that the vertical SLC is not only going to lead to this potential shift in users but may also impact on the ability to innovate and compete in the longer term.

Can I then trace that through to paragraph 8.161 as well, please.

"As set out in chapter 5, Facebook's market power has been sustained over time and reinforced through high barriers to entry. Our assessment on ability and incentives to foreclose, however, suggests that upon foreclosing its rivals from GIPHY, Facebook could (a) further weaken the already limited competition it faces from rivals by degrading their functionalities and features that currently use GIFs."

Then this:

"(b) limit the opportunities for rivals to improve existing platform functions that did not yet integrate GIFs or innovate with new functions that could benefit from GIFs."

There's a reference back to previous paragraphs in the decision, but you have I think had to look at this already, which is what is being said by the CMA is GIPHY

works with platforms to innovate with them and it might work individually with a particular platform, and the vertical foreclosure concern includes a concern that the other platforms will no longer be able to work with GIPHY to innovate and to improve their services.

It is that dynamic process which, among other things -- but it is that dynamic process that the CMA is concerned about. They are concerned that removing GIPHY from competitors removes the dynamic development of competitive threats of competition in the future.

You can see, if I put it that way, that you can't recreate the pre-merger conditions of competitions if you impose a remedy which involves, to take the extreme case, GIPHY just exiting the market. So if there's a remedy which doesn't ensure the survival of GIPHY and does not ensure that it can continue to provide a business which is able to supply these other competitors, you have not actually restored the pre-merger conditions of competition. You need GIPHY, in other words, to continue as a viable business post divestment.

Now there is a discussion, as I say, of this general phenomenon back in the remedies chapter. It is in connection with the open access remedy.

Can I ask you to turn back to page 918, please. You will recall, because I showed you the summary of the proposed behavioural remedy, that what Facebook was saying was: "Don't order divestiture. Just give others access to GIPHY." that was what the open access remedy was. Just make sure others have access to GIPHY.

At 11.252, the CMA, as part of its consideration of that proposal, said:

"The vertical SLC that we have found involves effects of the merger on competition between social media platforms and the supply of social media services. The nature of this competition involves constant innovation and evolution of

services. In this context, we have found the development and innovation of GIPHY's business under the open access remedy is likely to be directed at the interests of its owner, Facebook, rather than in the interests of the third parties seeking access. Given this overriding incentive, behavioural remedies cannot, in our view, be designed to comprehensively address the substantial lessening of competition that we have found. The technologically dynamic nature of the relevant markets, taken together with the nature of our SCL findings, contributes substantially to our view that behavioural remedies are unlikely to be effective in remedying either of the SLCs that we have found."

You will I hope see the parallel, which is the remedy that Facebook was suggesting at that point was flawed for several reasons, but one of them was it didn't address the dynamic nature of the vertical SLC finding. That's why it was rejected. That's one of the reasons why it was rejected.

Can I just show you then the conclusions at 11.268 to 269. I will just pause and invite the Tribunal to read those paragraphs, please.

MR JUSTICE MARCUS SMITH: 268.

MR JONES: 11.268 and 269. (Pause.)

Just to reiterate, this is in the context of the open access remedy, but why is it not split out and why isn't there a discussion of could we have a different divestiture remedy if there is just the vertical SLC finding? Why is there not a discussion on that (inaudible) and the answer to that is not what was being pushed by Facebook.

One needs to take a realistic view of these things. They can't consider every single possibility. They consider the most obvious ones. They consider the ones which Facebook comes back with, which were actually tailored to the individual SLCs, but they were behavioural remedies. But that's not to say

they didn't consider these issues. They did say clearly that these are the appropriate remedies to cater for both SLCs individually and in combination, and the reasoning which is clearly set out for rejecting the remedy which Facebook did at that stage propose is the same reasoning which I rely on now, as to why the proposal that there should be divestiture but without the full package wouldn't be sufficient. It wouldn't address the dynamic nature of it.

Now, the point which Mr Jowell then falls back on, which is a point that they put in their reply, and which he called the central argument, is that he says: "That's all well and good. You can keep GIPHY alive as an entity, I suppose, but why does it need to be raising revenue? You don't need to restore its revenue activities". The reason for that he said was you could sell it to Amazon, Apple or Disney, but, as I said, the CMA is looking to put together a divestiture package which is realistic.

When I say realistic, the language I think they use is effective and to a high degree of certainty, and they have, of course, looked in some detail at investors' views on things like Paid Alignment and revenue, and they have come to the conclusion that investors had positive views of those things and the market place had positive views of those things.

So they are absolutely entitled in those circumstances, and it is certainly is not irrational for them to say: "When we are putting together a divestiture package which is going to attract a suitable purchaser, putting together something which includes a revenue generating function, as GIPHY always did, is much more likely to be effective than just trying to sell something to one of the few enormous media companies who conceivably might have a use for GIPHY, even though it can't generate any revenue."

Sir, those are my submissions on ground 5.

Reply on ground 5 by APPLICANT

MR JOWELL: May I start by scotching the idea that it was somehow not in our notice of application and only introduced in our reply. It is in the first volume. You will see our notice of application, page 87, paragraph 124. We say this:

"The respondent did not in the decision ever adequately consider what would be an effective remedy for the vertical SLC alone. In particular, the vertical SLC arises because of the respondent's finding that Meta would have the ability and incentive to foreclose its competitors' access to GIPHY that could on any view be remedied by Meta divesting itself of GIPHY to any third party, which would preclude Meta from foreclosing its competitors' access to GIPHY. An effective remedy for vertical SLC does not therefore require GIPHY's ability to generate revenue and develop its Paid Alignment to be restored."

So the argument is clearly made and we simply reiterated it in our reply with an obvious example or two I think.

Now, I don't want to get too bogged down in the question of whether there is a wider theory or not in the decision for foreclosure, but we do maintain that position as well, and the passages that my learned friend took you to simply actually indicate to the contrary of what he said.

If you go, for example, to page 820 of the decision, at 8.159 (a), which he took you to, you see it says in the second sentence:

"However, social media services are ever evolving and, as set out above, we consider that Facebook's control of GIPHY gives it another tool to disadvantage its existing or emerging rivals."

So it is all about Facebook having control, not about the disappearance of GIPHY

altogether.

The same is true for 11.252, which you passed over on page 919. It starts at page 918:

"The vertical SLC that we found involves effects of the merger on competition between social media platforms and the supply of social media services. The nature of this competition involves constant innovation and evolution of services. In this context we found the development and innovation of GIPHY's business under the open access remedy is likely to be directed in the interests of its owner, Facebook, rather than the interests of a third party seeking access."

So it is all about Facebook owning it and then disadvantaging or foreclosing completely its competitors. That is what is under consideration in the foreclosure theory.

But it doesn't matter, because the bottom line is as long as the -- even if the concern is GIPHY needs to keep going in some form or other, you don't need to reconstitute the revenue function to do that. It is obviously disproportionate.

It may be that a buyer will choose to reinstitute that revenue function and revive Paid Alignments. Maybe they will do that. But there is no need to impose all these onerous conditions to achieve that for the vertical SLC.

As my learned friend conceded in the end, there is nowhere in the decision where they consider what is actually required for the vertical SLC in isolation, and in particular those conditions (b) to (f).

He took you to a number of sections which show in the guidance and in the decision this preference for structural remedies over behavioural remedies. Completely irrelevant in this context, because, in fact, the only truly structural remedy is the first remedy, the sale.

In fact, (b) to (f), which he wants to impose, are actually in large part behavioural remedies, because they involve, for example, Facebook having to enter into a contract, people giving commitments and so on.

So that is a complete red herring, and the fact is what it comes down to, as my learned friend asserts, he says "investors had a positive view of Paid Alignment". You can read the quotations in the decision. He also says: "Well, they wouldn't necessarily sell to the types of companies that I identified."

Could I in that respect just remind you of the companies that were identified by JP Morgan at the time? You see it at page 661. I am not going to read it out because it is confidential. Oh, it is no longer confidential because there is a cross on it. So I can read it out and I will. Those companies were: Adobe, Amazon, Apple, ByteDance, Kuaishou, Snap and Twitter.

Those are -- the only professional that has looked at the question of selling this business, these were the business that were approached to buy GIPHY at the time. They do not need -- they really do not need on any rational basis Facebook to reconstitute a revenue function for them for this very small business. They can take the assets and they can reconstitute the function very easily themselves and much more economically.

It is a shame in a way that CMA is even arguing this point, because the straightforward response should be just to accept that they just didn't give this consideration and that the only remedy that rationally is connected to this is (a).

Now, I can see they might say: "Well, we would like to give consideration to whether there should be some further elements to the remedy". For example, they might wish to give consideration to whether the purchaser should give some

form of commitment to continue supplying GIFs or something like that. That I can see, but for them to suggest that Facebook has to go through all this rigmarole of these various, extremely fiddly and expensive remedies to reconstitute or revive the business back from the dead, for those sorts of potential purchasers, it is just simply not proportionate, in my submission."

That is all we have to say about issue number 5.

That leads us to issue 6. I am hopeful actually that we will be able to deal with this relatively quickly.

MR JUSTICE MARCUS SMITH: Good. What we will do then is we will rise for a few minutes just to let the remote transcriber rest her fingers. Mr Jones. You were rising.

MR JONES: There is just one very, very quick point which is I think at the end there Mr Jowell suggested that my clients really should have said "we didn't really consider this". I just want to be clear -- I think he was saying it was disappointing they have not said that. I have submitted to you it was considered and I have shown you the language in the decision where they said they considered these points. That's on instructions. That's not just me, to be clear, reading the decision and putting my own spin on it. So I just wanted to be clear for the record that this was considered. I did say that to you, but I didn't want Mr Jowell to be suggesting anything different.

MR JUSTICE MARCUS SMITH: We can take this point as you have got it wrong, not that you didn't consider it.

MR JONES: May it put it this way? There is no reasoning in the decision that suggests that it was considered in any level of detail at all. There is one sentence which simply asserts that it is appropriate for both SLCs, but there's no reasoning. I mean, all of the passages that my learned friend took you to

at every stage it is dealt with collectively. So what goes on behind the scenes I can't speak to, but there is nothing in the decision that suggests that it was considered independently. So we do say that the decision is disproportionate in imposing these additional remedies and contains no reasoning to explain them in which they distinguish between the horizontal remedies and the vertical remedies.

MR JUSTICE MARCUS SMITH: Sure, but, to be clear, those are all factors which are potentially pertinent to ground 5, but ground 5 is a failure properly to assess the remedy that should be imposed.

MR JOWELL: Indeed. That must be manifested in the decision. It can't be that my learned friend stands up and says: "On instructions, no, we considered this deeply". What you are interested in looking at is the reasoning in the decision.

MR JUSTICE MARCUS SMITH: We are not going to say ground 5 succeeds because the CMA did not consider it. We may say, depending on the conclusion we reach, that there was an error, a reviewable error, in assessing the appropriate remedy on the basis that there was only a vertical SLC and no horizontal SLC.

MR JOWELL: No consideration in the decision given to that issue.

MR JUSTICE MARCUS SMITH: No consideration. We have got to work with what the CMA has provided.

MR JOWELL: Yes.

MR JUSTICE MARCUS SMITH: That's understood.

MR JOWELL: I am grateful.

MR JUSTICE MARCUS SMITH: We will rise for a couple of minutes and come back at 4 o'clock and we will run to enable you both to finish ground 6 this evening.

MR JONES: We are very grateful for that, Mr Chairman.

MR JUSTICE MARCUS SMITH: We will see how we go. Thank you very much.

(Short break)

Submissions on ground 6 by APPLICANT

MR JOWELL: Mr Chairman, we come finally to ground 6. This ground relates to three particular requirements imposed in relation to the remedies. We argue it wholly independently, so it applies regardless of whether we are successful or not on everything else.

We say, in summary, in relation to all three of these grounds that what they are doing are not simply attempts to remedy or mitigate the merger or its adverse effects, as the CMA are permitted to do. Rather, they go beyond that and we rather fear that they are attempts to re-engineer the market to introduce, if you like, a turbo-charged GIPHY in an attempt to stimulate competition. That's not the role of a merger remedy, but we don't attack them on grounds, of course, that they are made for an improper purpose. We attack them on the detail on the basis that they are irrational or disproportionate rather.

If I could start with the first, it relates to the amount of money that the report seeks to require Meta to provide GIPHY on its balance sheet to enable it to compete effectively, and the amount that it requires is $75 million. If you turn to the decision, please, at page 888, you will see how it gets to that point. You see essentially what it did is it arrives at one figure and arrives at another figure and takes the second figure away from the first figure.

Now, the first figure it arrives at is the amount that it estimates that GIPHY needs to break even in the here and now, and it does so by taking a point that is halfway between what it calls an optimistic estimate, on which it says it will start to earn revenue six months from completion, and be breaking even after

two years. That is its optimistic estimate. On its pessimistic estimate, it says it will start to earn revenue one year after completion and break even after three years.

It takes a midpoint between its optimistic and its pessimistic estimate and comes to $105 million. So that's the first figure. You see that in paragraph 11.123.

The second figure that it takes away from the first is the amount that it estimates it would have needed for GIPHY to break even in the absence of the merger. So in the counterfactual world is says that, absent the merger, GIPHY, it says:

"was forecast to be making cumulative losses of the amount of -- it is no longer confidential, so I can say -- of $30 million in the two years before it broke even, even with its revenue growing as forecast."

We say both of these figures are clearly unjustified, based upon the evidence before the CMA.

I take the second figure first, the one that's subtracted. We see that that is based upon GIPHY's forecast. You see that in 11.124.

"GIPHY was forecast to be making cumulative losses of $30 million in the two years before it broke even."

The problem with using that is if you go back to the report at page 720, you will see the figures. Perhaps if you could just read 7.151 and 7.142. So the bottom of page 720 to the top of page 721.

Sorry, 7.141 to 7.142. (Pause.)

So you see it is basing itself on highly ambitious revenue projections under the report's own assessment. Those forecasts were based not least on the assumption that GIPHY would persuade Meta and Snap to enter into revenue share agreements with it.

The evidence in the report shows that to be improbable, and the evidence here is

you can see, just for convenience, without going through everything, if I could take you to our notice of application, volume 1, page 92. Perhaps I could just invite you, please, to read paragraph 137 which has the references to the relevant evidence. (Pause.)

So we say the assumption that it would have broken even after only $30 million worth more of losses is hopelessly optimistic, even on the report's own findings, and it is also contrary to the contemporaneous documents referred to in the report. If I could show you that, if you go to 978, please, which is behind tab 24, and this is appendix E of the report.

If I could invite you to read, please -- some of it is confidential -- paragraphs 43 and 44. So it is page 978, tab 24, paragraph 43 and 44. (Pause).

MR JUSTICE MARCUS SMITH: Yes.

MR JOWELL: Obviously, I contrast the 30 million to get to breakeven that the CMA has used in the report with the figure in the purple that is referred to there, and that is regarded as rather hard to believe, because they say it would require them multiplying by ten their sales team.

So we say the losses that it would take to breakeven are out by an order of magnitude.

The CMA, in response, has had two attempts at dealing with this point. The first is in its defence at paragraph 177. What they say there is that the CMA says: "Well, we relied on our expert judgment to accept GIPHY's projections as realistic."

That's not what the decision suggests, because, as I have shown you, that is not what elsewhere in the decision it suggests, because if one goes to the previous paragraphs that I took you to, 7.141 and 7.142, it is clear that in those passages they didn't regard the projections as realistic. They regard

them to be highly ambitious.

Nowhere else in the remedies chapter does the CMA say: "Well, although we previously held these to be highly ambitious, we now think they are nevertheless realistic". That's something that's suggested for the first time in the defence.

The CMA, we say, can't reasonably rely on estimates that it considered to be highly ambitious that are quite out of line with the estimates that GIPHY was making at the time of the merger and that are contrary to the contemporaneous documents cited elsewhere in the decision.

Now, the second attempt is a bit more sophisticated in the CMA's skeleton argument at paragraph 107.

What they say there is what the CMA actually described as highly ambitious was the overall predictions and the idea that it would achieve those revenues in 2023. That they say is quite obviously different to the forecast of breaking even by 2022.

Well, as to that, really breaking even and revenue are intrinsically interlinked, and you have seen also what the contemporaneous documents show about their projections to breakeven.

The point just goes nowhere, because, contrary to the way that the CMA seeks to suggest, it is not correct that GIPHY's two-year breakeven projection underpins both the 30 million figure and also the 105 million figure. This is the alternative suggestion that somehow if you increase the 30 million, you also increase the 105, because if one goes back to paragraph 11.124 of the decision, which is on page 888, one sees, whereas the $30 million is clearly based upon the highly ambitious projections, the previous figure that they use in 11.123 for the length of time and amount that it will take going forward is

not based upon in any way what GIPHY thought at the time about how long it will take to break even, and, indeed, why should it be? The function no longer exists. The revenue function will need to be rebuilt.

What they are making in 11.123 is an independent assessment of how long it will take to rebuild it. So the two sides of the calculation are not connected. So that's what we say about the 30 million. It is obviously a massive under-egging.

We also say that the other side of the calculation, the 105 million, is based upon the need to rebuild the revenue function and reactive commercial relationships with advertisers, but it does not take into account the fact that the report already requires GIPHY to hire a chief revenue officer or recruit consultants to develop a monetisation strategy, and those are requirements that should be taken into account as well as the substantial incentives that Meta has to provide to staff.

So one sees effectively a form of double counting or a failure to take into account in the 105 the other steps that Meta is being required to take.

That's what we say on the first point. We say both sides of the sum are wrong, but our particular focus on the 30 million being obviously a massive understatement.

The next point in relation to remedies relates to what is found in the decision at page 899 in 11.166. What is required they say is that any purchaser of the divested business must make a commitment. The commitment is they say:

"A suitable purchaser needs to show a commitment to developing and providing a GIF-based advertising in the United Kingdom, for example, via GIPHY's previous Paid Alignment Advertising model and GIFs to social media platforms."

So the new buyer of GIPHY, probably one of those massive companies that I have shown you, has to promise, effectively, undertake to the CMA: "I am committed to developing and providing GIF-based advertising in the UK".

You go on to see in 11.167 they go even further. They say:

"The assessment of the purchaser's business plans will be critical for us to understand the purchaser's commitment to the relevant markets. We expect those plans to address the issues of building a revenue generating business and providing continued access to GIFs. Given the extent of the GIPHY's Paid Alignment and lack of current revenue function, we don't expect the purchasers will necessarily have a highly detailed plan for GIF-based advertising in the UK. However, we do expect to see consideration being given to routes for entry to the UK in the near future in those plans."

Now, this seems to us to have slightly lost sight of the fact that GIPHY is a United States company that has never sold any advertising in the UK. It never passed any resolutions or Board minutes committing to international expansion, let alone specifically to the UK. I mean, the United Kingdom is not mentioned in any Board papers cited in the report.

As for its investors, there's no evidence in the report that the investors, by which I mean the owners of GIPHY, were committed to international expansion, still less committed to international expansion in the UK.

The evidence you have in the decision shows that some of the individuals, some of the managers in GIPHY's revenue department, were considering the possibility of international expansion. They show that the UK was one country among I think five or six that the revenue department was considering as a priority. They also note they had some expressions of interest from advertisers in the UK. We know at that time revenue employees had

discussions with Board members about the possibility of international expansion, but that's as far as it goes.

I am not going to take you through it, but you will see it in appendix F to the report, which is at pages 1028 to 1031.

Perhaps I can just show you the conclusions that are reached in relation to this on page 738 of the report. If I can just show you that:

"We consider that the submissions from [the individuals there mentioned] don't show either the barriers to UK entry for GIPHY made such entry unlikely, or that GIPHY had concluded prior to the merger that international expansion or UK entry in particular was unattractive or unrealistic. On the contrary, GIPHY executives were discussing international expansion, including to the UK, as an opportunity in early 2020, and this opportunity continued to be raised at Board level up to March 2020. We note that at the time of the merger GIPHY was still at a relatively early stage of developing its Paid Alignment model and it had not developed plans for a full international expansion. However, GIPHY was a global market leader in the supply of GIF services. GIPHY's most important partners had a strong presence in international markets and accordingly a substantial proportion of its traffic was in those markets, including in the UK. We consider GIPHY had a strong incentive to extend Paid Alignments to its international markets. As noted, even at the relatively early stage of its development, it identified international expansion as an opportunity at senior level, and at operational level it was developing plans in response to this opportunity. Taking the evidence in the round, we remain of the view that GIPHY was likely to have entered into the supply of Paid Alignments in the UK."

So yes, they stay that it would be likely to enter into UK markets and there were

discussions about international expansion, but without there being developed plans, but there is just no evidence or finding that GIPHY's Management Board, still less any of the previous owners in GIPHY, the investors, whether that be Lightspeed or anybody else, had any sort of commitment to GIF-based advertising in the UK.

So we say if you are simply trying to remedy the effect of the merger, on what conceivable basis do you seek to extract from what would almost certainly be a non-UK buyer a commitment specifically to expand into the UK, and to have effectively a business plan which gives consideration for routes to entry into the UK?

There is a prediction that GIPHY would have entered the UK market, but that's not the same as a commitment.

What's going on here really is the CMA is forcing its conjectures to become reality and is doing that by seeking to extract commitments from the buyer which were never there to the previous owner. It is seeking to engineer an outcome that may or may not have eventuated in the counterfactual.

If the report is right, that there's a commercial incentive to expand internationally and to do so also to the UK, then that would be the case, one would expect, for the new purchaser as well, certainly if the new purchaser has a working revenue arm, which is part of the CMA's other remedies.

The CMA can remedy the SLC but then, in our submission, it must let the market do its work. What it is not entitled to do is to manufacture competition in the form of GIF-based advertising in the UK. That's to seek to engineer the market, to force its predictions and conjectures to become reality.

I would add that to suggest that the buyer should have a commitment to this country specifically is a combination of regulatory myopia and regulatory nationalism,

or perhaps a combination of the two, because there is no basis for saying it should have a unique commitment to this country, rather than say to Canada, France, Mexico, Brazil or any of the other countries that it was considering. To seek to make it have such a commitment is to tie the hands of the purchaser in a way that is wholly unreasonable and disproportionate.

MR JUSTICE MARCUS SMITH: Is there a connection between this point and the dynamic competition point that we debated a few days ago, in that what the CMA has been looking at in terms of SLC is what they call a dynamic competitor, and we will obviously have to think about exactly what that means, but I think one of the things that the CMA says it means is that one looks to potentiality and doesn't simply go for, as it were, a linear extrapolation of where an entity is.

MR JOWELL: Yes.

MR JUSTICE MARCUS SMITH: If on that dynamic assessment one concludes that what would have happened is that GIPHY would have expanded its Paid Alignment, including in the UK, then that makes the condition on remediation more comprehensible, in that what you are doing is you are saying: "What we need to achieve in the UK", and the CMA may well be hypothesising that dynamic competition would lead GIPHY to expand in Canada, France, or anywhere etc, but that's not the CMA's concern. The CMA is concerned with remediation in the UK. Is there sort of nexus between the two points?

MR JOWELL: Certainly, I think the CMA would say that that is indeed a justification for this commitment. They say: "Well, it is standard practice to require a purchaser to demonstrate a commitment to competing in the relevant market, and we say that in the counterfactual you would have entered the UK market. Therefore we are going to require a commitment".

But the reality is that this aspect of their finding is entirely about potential competition. There's no actual competition in the UK at the moment. You can't simply apply the merger guidelines and say: "Well, where you're in the market and you are selling to someone, the purchaser has to demonstrate a commitment to continuing to compete in that market."

It is very different when you are talking purely about potential competition, because in those circumstances what they are trying effectively to do is to make come true that which is purely conjecture on their part.

If they are right that there is this dynamic process of competition, whereby there will be an incentive for GIPHY to roll out internationally, the market will achieve that, and there's no need to extract a commitment from a purchaser.

It's an extraordinarily intrusive and long arm remedy to say to a foreign purchaser: "You must specifically commit to enter into the UK and have plans to do so."

Actually, this is where considerations of comity do come in, but we say one does not need comity. It is just disproportionate to do this, because it is not genuinely remedying the pre-merger situation. You are trying to manufacture something that has never been there.

One can test that, because one can simply say: "Did the previous owners, did Lightspeed have a commitment to the UK?" Of course not. It is an international venture capitalist. It has no specific commitment to the UK market. It had not even committed to international expansion generally, not even at Board level, so this is going well, well beyond what is a proportionate response to the merger.

The final point we have on ground 6 is the express obligation that is sought to be imposed on Meta to enter into a contract to purchase GIFs from GIPHY.

Again we say, very shortly, that is not a remedy that's connected to remedying or

mitigating the adverse effects on competition. Meta has never been under any obligation to purchase GIFs in GIPHY. Under its current contractual obligations, prior to the merger, it would have been entitled to terminate its contract with GIPHY from one day to the next. Indeed, it would have the technical ability to do so as well, and to move to Tenor in its entirety.

We say the whole basis of the vertical SLC is that GIFs are a critical input and we say that if that's correct, well then, Meta will require this critical input. But what you don't require to remedy the SLC is to impose a contract upon Meta to force it to do so.

Those are our submissions on those three grounds.

MR JUSTICE MARCUS SMITH: I am grateful, Mr Jowell. Thank you very much.

Submissions on ground 6 by RESPONDENT

MR JONES: Sir, on 6 (a) one needs to be a little bit careful, because we don't have the right printouts of confidential material, but I think it can be done in open. It just means I need to have this iPad open in front of me and hope I don't make any errors. So I may need to take a couple of minutes. I have already pressed the wrong button. No, here we are. We are back.

The 75 million-dollar figure is what I need to start with. I need to show you in some detail how that was actually arrived at. Mr Jowell has already done that, but I don't agree with his description of it. So I need to actually just explain the steps in the calculation.

If one starts -- have in front of you, please, page 887 of the decision. You will know in broad terms the questions which the CMA was asking were, on the one hand, how much cash would GIPHY have needed before breakeven, but for the merger, and then, on the other hand, how much cash will GIPHY need before breakeven, if it is divested, and then the amount which Meta should

fund is essentially the difference between those two.

Now, on the question of how much cash GIPHY would have needed before breakeven, but for the merger, that is answered in 11.124. As you know, the answer that the CMA gave, and it is an estimate, and I will come back to that in a minute, but the estimate, if I can put it this way, the estimate which the CMA used, and you will see why I am putting it that way in a moment, the estimate which CMA used was $30 million in two years before breakeven. That was a GIPHY forecast. It was the only available forecast and it was the one which the CMA used. So it was $30 million, but for the merger, two years.

You then turn to the second question. How much cash will GIPHY need before it is divested. Obviously, there is not a ready to use estimate for this. The CMA had to make its own estimate and you have to start with an idea of the operating costs per month.

You will see the number that was used in the footnote, footnote 1528. I see that is still marked confidential. Footnote 1528, you will see the operating costs per month. Just to piece it together, that comes from GIPHY's estimates. You can see that from 11.121. I just pause and I see that's still confidential. If I can invite the Tribunal to read through 11.121. So they have an operating cost per month drawn from GIPHY's estimates.

If you then turn to 11.123:

"Even using an optimistic estimate, where GIPHY starts to earn revenue six months from completion of the divestiture and is breaking even after two years, operating losses could amount to 58 to 72 million. Using less optimistic assumptions would make this figure materially higher. For example, if GIPHY starts to earn revenue one year from completion and takes three years to

breakeven, operating losses could amount to 94 to 117 million."

Then they say at the end:

"We consider the less optimistic scenario is likely to be more reflective of its future performance."

So just to tie together a few points on this, the less optimistic scenario is that 94 to 117. The reason why the less optimistic scenario is a range is because the monthly operating costs in the footnote are a range. So you have a range in that less optimistic scenario.

Can I also just make clear that where it says: "If GIPHY starts to earn revenue one year from completion and takes 3 years to break even", it means three years in total to break even. So if you try to run these calculations, what you have to do is 12 months of operating costs incurred but no revenue, and then another two years of operating costs, monthly operating costs being incurred but increasing revenues up to breakeven. That's how the calculation works, and that's what takes you to 94 to 117.

So the midpoint that they use, actually the midpoint of that is 105. We need to be clear about that. It is not a midpoint between the optimistic and the less optimistic. It is the midpoint between those two numbers.

Of course then the final step is to say that Facebook should fund the difference, which is 105 minus 30.

The really important point and the reason I go through that in some detail is that the two figures are interlinked. Mr Jowell is at pains to say they are completely separate, the 30 million and the 105 are separate things. He said at 11.123 what the CMA is doing is making a completely sort of independent assessment. But it is not, and it is not for a couple of reasons. One is the point about the operating costs, and having to use operating costs, and that is

taken from GIPHY's numbers, which is the same data that led to the 30 million estimate. So, you know, that's at the heart of both of them. But also, if you look at the reasoning here, what they are clearly saying is because of the position that GIPHY is now in -- they say this at the end of 11.123, because of the position that GIPHY is now in, it is going to take longer to break even than it would have done previously. So the three year to breakeven estimate is not sort of completely detached from the two year to breakeven estimate that GIPHY had made.

Obviously, what the CMA is doing is they are looking, on the one hand, at GIPHY's two-year estimate and then they're saying: "Well, things are now much more difficult." So if there was a divestiture now, how long would it be to break even? Well, it might take, 11.123, two years and six months, or it might take three years.

They are obviously related. The two numbers are building up on the same foundations. The reason that is so important, it links back to what I was saying about these just being estimates. All the CMA could do was make an estimate of how much cash was going to be needed and it used, as I said, the only figure that was available as an estimate, the 30 million figure, but if the 30 million figure is overoptimistic, which is what Mr Jowell says, then you would just rationally have to ask yourself what would be the implication of that for the 105 million figure. Mr Jowell has not broken it down, when he says the 30 million figure is overly optimistic, but I think logically there can only be two possibilities.

One could say, firstly, well, GIPHY's monthly operating costs would have been a lot more than it estimated, so that's why the 30 million is over-optimistic. If that's right, then those higher operating costs would play through into the 105

estimate.

So if the operating costs have been underestimated, then that's going to impact on both numbers.

I think the second thing you could logically say -- of course there could be a halfway house splitting the two things up -- the two year period was overly optimistic. GIPHY was never going to break even in two years, but for the merger, but again, if that is right, it would have a knock-on consequence for the estimate as to how long is going to be needed now under the divestiture scenario.

That's why we have said these are interdependent, or maybe that's putting it too high. They are interlinked. They rest on the same sorts of assumptions, and if you raise one because you are changing the assumptions, then you are going to raise the others.

Could I just mention in my skeleton argument there is a footnote where we tried to give a mathematical description of what would happen if you changed some of the assumptions and if you said, for example, it is not going to be 30 million -- it is not going to be two years to breakeven. It would have been three years to breakeven, you tried to make that tweak to your assumptions. I mean, it is a bit rough and ready, and I accept that, but the result, if you look at the footnote, is to say you just bump up those figures by the same amount of money with that sort of extension of two years to three years and which would have a knock-on effect of three years to four years.

It is rough and ready, although I have put the calculations in there so you can look at how it is done.

This is a rationality challenge to an exercise which actually can only be rough and ready, because this is just estimating how much cash is going to be needed to put them back in the position that they were in previously. The fact that these

figures, as I say, rest on the same assumptions means that precision in -- is it two years, is it two and a half years, is it X or Y million pounds per month of revenue, I am not going to say they don't matter, but they don't particularly shift the dial, because they are going to impact on both side of the balance.

Trying not to repeat myself too much. They are linked and they are based on the same assumptions and you have the point. For us it is perfectly reasonable to use the estimate that has been given.

I should say it is also true that where the CMA says at 7.141 in the decision that the estimates are highly ambitious, I am not sure if I can read out these numbers, but if you look to the previous paragraph, 7.141, you will see that there's a discussion of GIPHY's projected revenue figures, and you will see it had this incredible kick-off point built into it by 2023, under the revised ones.

There is a comment that this is highly ambitious but that extremely highly ambitious takeoff figure is obviously quite different from saying that we are going to be breaking even within a couple of years.

Remember, breakeven does not require revenues anything like that extraordinary figure you see in 7.141. You have seen the monthly operating costs. It is nothing remotely close to that.

So that's the first point which Mr Jowell makes under 6 (a).

His second point is a challenge to the 105 million estimate. As I understand it, what he says here is that the CMA failed to take into account when it made that assessment the fact that the CMA's remedy also required GIPHY to recruit a chief revenue officer or to engage third party consultants in order to develop its capacity to generate revenue, and that it requires incentives to be given to the staff.

We don't understand that. The reason we don't understand it is it is just

an assertion. It seems to me again those points, because they weren't repeated in this part of the text, weren't taken into account, but obviously that does not follow. They were clearly considered, all of those points, by the CMA.

If you look back at 11.123, where the CMA is talking about why it is going to take three years instead of two years, which is what GIPHY's plan was, they are not referring to any of those points. They are referring to rebuild revenue function, reactivate commercial relationships with advertisers.

So that is the answer to 6 (a).

6 (b) then, if I can turn to that, please. 6 (b) is the commitment to the United Kingdom. Could we take it up, please, at 731.

It starts at the section "Expansion into the UK". 7.171:

"Between December 2017 and February 2020 GIPHY's revenue team was developing an international delivery plan, which staff considered would require only a two week period to implement, from an engineering perspective and sought internal approval to move ahead with operationalising it. It appears this plan was developed in response to significant interest from advertisers regarding international opportunities that GIPHY was fielding in the months prior to the onset of the Covid pandemic."

The next paragraph:

"The UK appears to have represented an important component of these international plans. GIPHY highlighted the UK as one of..."

You will see what it says:

"... in which to service international brand campaigns due to its substantial share of total GIF inventory. In late 2019, staff suggested a trip to the UK to explore market potential. There was also some interest from UK-based advertisers."

There is then a discussion of various submissions that were made. If we turn forward, please, to page 735, you will see in this a discussion responding to certain individuals' points, but could I just remind you -- I know you have seen it before -- on page 736, just have a look at (ii) and (iii) to see what is said about Board decks, the papers that went to the board and the GIPHY Board update core materials.

MR JUSTICE MARCUS SMITH: Yes.

MR JONES: Then going forward, the concluding paragraphs in this section from 7.180, picking it up halfway through that paragraph:

"On the contrary, GIPHY executives were discussing international expansion, including to the UK, as an opportunity in early 2020, and this opportunity continued to be raised at Board level up to March 2020."

Then, 7.181, there is the point that it had a strong incentive. At the end there:

"Taking evidence in the round, we remain of the view that GIPHY was likely to have entered into the supply of Paid Alignment in the United Kingdom."

Of course, many of the submissions that Mr Jowell made to you just now were essentially criticisms of the merits of that. So he suggested that there was not sufficient evidence to say that GIPHY was likely to enter Paid Alignment in the united Kingdom.

Now I have taken you back to that evidence to show that was not the case. There was actually a very firm evidential foundation --

MR JOWELL: I don't make any such challenge to that finding. I accept that is a finding in the report that we don't seek to challenge that it is likely. My challenge is to the notion that there was any commitment, which is a different thing entirely.

MR JUSTICE MARCUS SMITH: Thank you, Mr Jowell. That probably helps.

MR JONES: Absolutely. Those then are the pre-merger conditions of competition. GIPHY was likely to enter. So what one needs to try to restore, what the CMA is seeking to restore is a situation in which GIPHY is likely to enter, and, of course, the findings which are made in this report, they are balance of probability findings. So it was likely to have entered, just to be clear is the same thing as saying on the balance of probabilities is going to enter.

They then need to restore, so you then you have to ask the question: How do we restore a condition of competition where what we think is they would have entered? We somehow have to bring that about.

The obvious way to do it and I showed you this in the guidance -- this is not a new thing -- I picked this up in the guidance -- the obvious way to do it to say: "Well, the purchaser should have a commitment to enter into the particular market."

Now I may be missing a point of finesse about the difference between they were going to enter versus you have got to show a commitment to enter versus something less than that, but as far as we see it, it is as close a mirror as you can get. They were going to enter or, if you like, if you prefer, they were likely to enter, and what we have asked for is a commitment to enter.

We have not, to be clear, said that you must enter. There is not an obligation on the new purchaser. We have not made it something stronger than a commitment.

Actually, if you look at the decision on page 899, there's a bit more colour about what the CMA means by this in practice, how they are going to assess it.

The reference to commitment is at 11.166. Then, 11.127:

"Accordingly, assessment of purchaser business plans will be critical for us to understand the purchaser's commitment. We would expect those plans to address the issues of building a revenue generating advertising business and

providing continued access to GIFs. Given the extent of GIPHY's Paid Alignment Advertising pre-merger, and the lack of a current revenue function, we do not expect that purchasers will necessarily have a highly detailed plan for GIF based advertising in the UK. However, we do expect to see consideration being given to routes for entry to the UK in the near future in those plans."

So, you know, the commitment in practice, we expect consideration to be given for routes to entry.

As I say, I might be missing the point, the finessed point about likelihood and so on, but they thought they would enter. I agree if what is being said is there was a chance that they wouldn't. Yes, there was a chance that they wouldn't. Now they are asking for a commitment. There is a chance that they won't enter as well. There is a chance that the new buyer won't enter the UK market. They might change their mind in the same way as GIPHY could have changed its mind in the past.

So it is doing, as I say, as much as can be done. It is creating a mirror of the two situations.

I suppose Mr Jowell might say the condition might be you have to show that the new purchaser is likely to enter, since that's the precise mirroring, but it is very hard to see how CMA is going to judge likelihood at the new purchaser stage without looking at its commitments. It is the first thing you would go to. "Show us your plans."

Mr Jowell did make another point about incentives. He said if GIPHY has an incentive to enter now, then under the new owners -- or if it used to have an incentive to enter, then under new owners it would also have an incentive.

As you see, the findings went well beyond incentive. An incentive is part of the

CMA's consideration into whether something is likely to happen, but it is not the end of the story. They look at the actual evidence. What are the plans? What has been discussed? All of that goes into the mix. So just recreating the incentive would not be enough to recreate the conditions of competition.

Ground 6 (c) then is this short-term agreement with Meta point. Here again this is simply restoring pre-merger conditions. You can see this, please, on page 631, paragraph 6.25:

"On the basis of the evidence set out below, we consider that GIPHY would have continued to innovate and develop its products, and within that context, in view of the above, we also consider it likely that Facebook would have continued to procure GIFs from GIPHY, absent the merger."

So that's the finding. Again, the CMA is just trying to recreate those conditions of competition.

Now, of course, one might say what has changed? Meta still has a need for GIFs at the moment. Why would it be any different after divestiture? To some extent the CMA does recognise that point. To some extent that's recognised. But, on the other hand, we are now talking about a somewhat different situation than pertained pre-merger, because we are talking about a situation post divestiture, in which GIPHY will be in new ownership, and therefore possibly with new plans.

If you look in the decision at page 889 -- in case this is still confidential -- it is in mine -- could I ask you to read paragraph 228?

MR JUSTICE MARCUS SMITH: Yes. (Pause.)

MR JONES: So, sir, you will see going into the post divestiture world, into that hypothetical world, there are some reasons why the situation might be a little bit different and why Facebook's attitude towards GIPHY might be different

I don't want to place too much emphasis on this. It might not be, but it might be.

There were also some indications that Facebook might have incentives in both directions, as it were.

If one just looks at 11.131, you see the parties' initial submission, where they commented that:

"If GIPHY had established indirect competition between Facebook and its social media rivals, such that these would become even fiercer competitors to Facebook, then Facebook could have pulled the plug on its support for GIPHY at any point, which would have severely damaged its future prospects. This suggests a countervailing incentive on Facebook regarding its decision to continue to take GIPHY's products after a divestiture. We would also note that it is under no contractual obligation at present to use GIPHY."

So obviously Facebook will have, after divestiture, reasons to carry on using GIPHY, but also there are some countervailing incentives and there are some uncertainties which you see, for example, in paragraph 11.128. Putting those things together, in my submission, the CMA must be entitled to say, in those circumstances, it is necessary to ensure that in the short-term GIPHY can maintain its relationship with Facebook if it chooses to, because that's what would have happened, absent the merger.

Meta says, of course, this goes beyond what would have happened but for the merger. It is necessary to be very precise about this. It is vital, in my submission, to distinguish between two things.

It is true that there wasn't such an agreement pre-merger. So in that narrow sense this involves the creation of an obligation which did not exist pre-merger. That's true. But that is a question of means rather than ends, if I can put it

that way. That's how you get there. Because the end is, the objective is to restore the pre-merger conditions of competition, and, as I have explained, that may well involve the imposition of new obligations and of new relationships. It's an entirely permissible approach. It is directed at restoring pre-merger conditions of competition. As I have said, that does not necessarily mean that you can only restore the pre-merger contractual relationships and so on and so forth.

It is described in one of the authorities in a slightly different context. It is not worth looking at the authority I don't think, but there is a description of these untangling exercises as "unscrambling" a merger which has already happened. Clearly, when you unscramble something, that's a very complex exercise and, as I say, as long as your objective is to get back to where you started, you can use the wide range of means which are in schedule 8 of the Act.

Sir, unless I can assist on anything else, those are my submissions.

MR JUSTICE MARCUS SMITH: I am very grateful, Mr Jones.

Reply on ground 6 by APPLICANT

MR JOWELL: Very briefly, we maintain the position that all three of these remedies go well beyond what's necessary to remediate the merger and their attempts essentially to put on bells and whistles into the post competitive situation.

In relation to the first point, my learned friend's main point was his assertion that the amounts are interlinked, as he put it, that if you raise the 30 million, you also have to raise the 105 million. I am afraid there is a limit to the extent to which it is permissible to interpolate things into the decision which just are not there.

If I could invite you to go back to page 887 of the decision, my learned friend said there were two ways in which they were interlinked. One was in relation to

the operational costs, he said. So if the costs pre-merger go up, then the costs post-merger go up. The other, he said, is the length of time it will take to break even.

Now, the costs post-merger are calculated in 11.121. What it is based on, as you see in the middle of the page, it talks about the operating costs of GIPHY in 2019, in 2020, 2021. It says:

"In its response to the remedies working paper, Facebook said that GIPHY currently has."

Then it gives you the cash rate burn figure per month. You see that?

MR JUSTICE MARCUS SMITH: Yes.

MR JOWELL: And it says:

"Total operating costs at divestiture are likely to be higher as a result of incentives."

You see it gives the equivalent figure on the last line.

If you look in footnote 15.28, which is where the estimates going forward for operating loss comes, you see it's based on operating costs of the amount that is there. You will see that is per month. That per month figure corresponds exactly to the per year figure that you see in the last line of 11.121. It is quite difficult to do this without referring to the numbers but do you see the point I am making.

MR JUSTICE MARCUS SMITH: Yes.

MR JOWELL: What that figure is based on is not what losses GIPHY was making historically. It is based upon what Facebook has said GIPHY's current cash burn rate is, and then an amount has been added to take into account the costs of the incentives for the staff and all of that that they are going to add on top of this.

So that's the first connection, he alleges. There is no connection. It is entirely based

on forward looking amounts, based on Facebook's estimates, not on what GIPHY was incurring historically.

The second point he makes is he says: "Well, if you say that historically it would take more than 30 million, multiples of that before it breaks even, then you are implicitly saying it would take longer to break even in the past and therefore you must now say it will take longer to break even in the future."

But if you look at 11.132, this is where they estimate how long it is going to take to break even in the future. They estimate a range, from an optimistic scenario of six months for revenue and two years for breakeven, and a pessimistic one of one year to earn revenue and three years to breakeven. There is no suggestion there, no suggestion that that is based upon any previous historic losses by -- time to breakeven by GIPHY. There is nothing in there.

In fact, as my learned friend went on to say, quite rightly, he said the reasons given for those periods is in the last sentence:

"Given the need to rebuild the revenue function and reactivate commercial relationships with advertisers."

So the reason that those durations are selected is forward looking. So you can't just interpolate into the decision that these two things are interlinked when there is nothing in the face of those paragraphs to link them together. So we respectfully say that the figure that is taken away is a gross underestimate and it needs to be clearly recalculated.

Now the second point, the commitment. My learned friend says, "Well, I don't know what is the difference between the fact if you were likely to enter and a commitment to enter". Well, let me test it this way. Let's suppose that all regulators acted in this way across the globe, and let's say that, since GIPHY's consideration of international expansion extended to many markets,

let's suppose that the Canadian regulator and the Brazilian regulator and the Mexican regulator and the French regulator all said, "Well, we think it is likely that you would enter our markets". There is no evidence that entry into the UK would be any more likely than half a dozen markets across the world.

On my learned friend's approach they would all be entitled to extract commitments from a future purchaser to enter into -- to have a commitment to enter into their market. We respectfully say that's going to put off any purchaser that takes their commitments seriously. We like to think that purchasers do take their commitments seriously. They are not just a puff in the wind. They should be seriously made.

That is totally, in our respectful submission, impractical. If the incentives exist genuinely for this business to expand internationally, it will expand internationally in any event. If they don't, the CMA shouldn't be trying to impose commitments to achieve a result that the market wouldn't have achieved. So that's what we say in relation to the second issue.

The final point is in relation to the imposition of a contract on Meta when it didn't have one at any time in the past.

My learned friend took you to the relevant paragraphs in the decision, and I respectfully say that they are simply unreasoned. They are based upon no more than effectively an apprehension that Meta might pull the plug on GIPHY. That is something that was said not by way of -- in any kind of implicit threat. It was simply to explain to the CMA that the reality is that GIPHY's business was entirely dependent in practice on the goodwill of Meta to continue to allow it to effectively use its users on its platform, and that it was explaining that it could end that relationship at any point that it chose.

There is no basis to use that explanation of a historic situation as a justification for

imposing something that was never there pre-merger, namely a contractual commitment.

Those are our submissions in reply. Thank you.

MR JUSTICE MARCUS SMITH: I am very grateful. We have no further questions. We are very grateful to the parties for their very helpful submissions over the last four days. We will obviously reserve our judgment.

Is there anything more by way of housekeeping that we ought to address?

MR JOWELL: Not from our side, sir.

MR JONES: No, not from our side either.

MR JUSTICE MARCUS SMITH: Well, I think it would assist, even if we don't address it in the judgment, if we had short points about the remediation point and section 31(2)(a) of the Senior Courts Act. I say that simply because it could conceivably affect the way we approach the structure of the judgment. It may not, but I think it would be helpful to know where we stand on that.

You, Mr Jowell, were quite right. The Court of Appeal has addressed this, but the point was conceded without argument before the Court of Appeal.

MR JOWELL: Ah, yes.

MR JUSTICE MARCUS SMITH: So it is not as clear-cut as --

MR JOWELL: It was I think considered in a judgment --

MR JUSTICE MARCUS SMITH: I believe it was considered in a judgment below, Mrs Justice (inaudible) I think.

MR JOWELL: Mrs Justice Lang, yes.

MR JUSTICE MARCUS SMITH: The point is obviously quite an odd one. On the one hand, I can see that the transposition of principles of judicial review means just that rather than, as it were, statutory overlays. On the other hand, it would be quite strange to say that the principles of judicial review don't

include an obligation to hold up a decision where it would have been the same as per section 31(2)(a) when that's what the section says. So it seems to us it is not a straightforward question.

MR JOWELL: No.

MR JUSTICE MARCUS SMITH: I think we would like some help on that.

MR JONES: Sir, we will certainly provide some help. Actually on that point it was raised in the Sabre case by Mr Justice Morris. The same question you put to us was raised, which I had a dim recollection of, which is why I gave you a somewhat garbled response earlier on.

The response which the CMA gave then was essentially what you have just said, which is that it is complicated, but underlying that it is actually really important obviously for the Tribunal, because it goes I think to your jurisdiction. I think it is something which you would have to consider if it does bite. So we will approach it with that in mind when making submissions.

MR JUSTICE MARCUS SMITH: That's absolutely right. The section says "must".

MR JONES: Exactly.

MR JUSTICE MARCUS SMITH: There is no fudging it. It is really -- the only reason I was saying we would like it now in a somewhat hesitant way was because it is very likely I think that we will be having a separate debate about that in due course, but I think we would like to just have a sense of what the problem is, even if we don't concretely resolve it in the judgment.

MR JONES: Can I be absolutely clear, sir? I think you said remediation and section 31. We were trying to think is there a separate remediation point, but you are just inviting submissions on the section 31 point?

MR JUSTICE MARCUS SMITH: Yes, that's right.

MR JONES: Only on that.

MR JUSTICE MARCUS SMITH: Yes. We will as necessary address the other things.

MR JONES: I am grateful.

MR JOWELL: I think we do refer to this point in a footnote to our reply.

MR JUSTICE MARCUS SMITH: I was looking --

MR JOWELL: (Inaudible). My learned juniors will ...

MR JUSTICE MARCUS SMITH: It is in one of the intervenor's statements as well where they say I think --

MR JOWELL: Yes, it is.

MR JUSTICE MARCUS SMITH: I think they say it is a hard question as well. We are all agreed on that. I mean, one of the points I think that I am sure you will address, but it crossed my mind, if we were purely and simply an England and Wales Tribunal, I think the reading in of section 31 would be quite hard to resist, but because we are a UK Tribunal, that may make a difference. I mean, I again say nothing beyond please do think about that as well in your submissions.

Well, thank you all very much. We will adjourn until a date in the future. Thank you.

(17.19 pm)

(Hearing concluded)