Neutral citation [2022] CAT 26

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1429/4/12/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

14 June 2022

Before:

SIR MARCUS SMITH
(President)
PROFESSOR JOHN CUBBIN
SIMON HOLMES

Sitting as a Tribunal in England and Wales

BETWEEN:

META PLATFORMS, INC.

Applicant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

- and -

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

Interveners

Heard at Salisbury Square House on 25-28 April 2022

JUDGMENT

APPEARANCES

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

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

CONTENTS

A. INTRODUCTION

(1) The parties to the Merger

1. The Applicant, Meta Platforms, Inc. ("Meta"[1]) was founded in 2004. Until 28 October 2021, it was known as "Facebook". It is the parent company of a group which offers a wide range of online products and services worldwide, including Facebook, Instagram, Messenger, WhatsApp, Oculus, Portal and Workplace.

2. GIPHY, Inc. ("GIPHY") was founded in 2013 with headquarters in New York. It is a company largely owned and funded by its venture capital investors. It operates an online database and search engine which allows users to search for and share "video GIFs" and "GIF stickers". GIFs are Graphic Interchange Format image files and GIF stickers are animated images with a transparent background.

3. It will be necessary, in order to determine this application, to describe with some care the businesses of both Meta and GIPHY, but we do not do so here.

4. GIPHY has never had any physical presence in the UK, nor any UK turnover, nor any turnover generated outside the US.

5. In October 2019, GIPHY was seeking financial support through an equity fundraise or the sale of the company and – during the course of that process – Meta expressed an interest in purchasing GIPHY. A term sheet between Meta and GIPHY was signed on 7 April 2020. On 15 May 2020, Meta acquired GIPHY, via Meta's wholly owned subsidiary, Tabby Acquisition Sub, Inc., for US$315 million plus US$85 million in deferred stock options for employees of GIPHY. We shall refer to this acquisition as the "Merger".

[1] A list of the terms and abbreviations used in this Judgment, setting out where in the Judgment such terms and abbreviations are first used, is at Annex 1 hereto.

(2) The Merger inquiry

6. On 29 May 2020, the Respondent, the UK Competition and Markets Authority (the "CMA"), requested information about the Merger, which Meta provided on 3 June 2020. On 5 June 2020, the CMA issued a notice under section 109 of the Enterprise Act 2002 and confirmed its intention to investigate. On 9 June 2020, the CMA made an initial enforcement order under section 72(2) of the Enterprise Act 2002 in connection with the Merger. On 28 January 2021, the CMA stated that it had sufficient information in its possession to enable it to begin an investigation for the purpose of deciding whether to refer the Merger to its chair for the constitution of an inquiry group under section 22(1) of the Enterprise Act 2002.

7. On 25 March 2021, the CMA decided to refer the Merger to its Chair for the constitution of an inquiry group, which it did on 1 April 2021. The members of the inquiry group so appointed (the "Group") were Stuart McIntosh (the Chair), Robin Cohen, Margot Daly and Stephen Rose.

8. The CMA notified its "Provisional Findings" on 12 August 2021, together with a Notice of Possible Remedies. On 10 September 2021, the Group decided to extend the reference period under section 39(3) of the Enterprise Act 2002 so as to expire on 1 December 2021. On 30 November 2021, the CMA notified its "Decision" on the reference.

(3) The Decision

9. The Decision found as follows:

   (1) That the Merger had given rise to a "relevant merger situation" for the purpose of section 35(1)(a) of the Enterprise Act 2002.[2]

   (2) That the Merger had resulted or might be expected to result in a substantial lessening of competition within a market or markets for

[2] Decision/§3.4. A "relevant merger situation" is statutorily defined in section 23 of the Enterprise Act 2002.

services in the UK for the purpose of section 35(1)(b) of the Enterprise Act 2002.[3] The Decision found a substantial lessening of competition in two forms:

(i) *Horizonal unilateral effects.* The CMA found that the Merger would lead to a substantial lessening of competition in the supply of display advertising in the UK.[4] We shall refer to this as the "Horizontal SLC".

(ii) *Vertical effects.* The CMA found that the Merger had resulted or might be expected to result in a substantial lessening of competition by reason of the potential foreclosure of GIFs from GIPHY as an input to competitors of Meta in respect of social media services worldwide, including in the UK.[5] We shall refer to this as the "Vertical SLC".

10. To remedy these adverse outcomes, the CMA determined, for the purpose of section 35(3)(a) and (c) of the Enterprise Act 2002 that Meta should be required to divest itself of GIPHY to an independent purchaser with the capability and a demonstrable commitment to developing and providing GIF-based advertising in the UK and GIFs to social media platforms and to take a number of further measures ostensibly for the purpose of unwinding the Merger. These included transferring at least US$75 million in cash to GIPHY and entering into a short-term agreement with GIPHY for the supply of GIFs.[6]

(4) The application

11. This is an application under section 120 of the Enterprise Act 2002 for review of various of the decisions made by the CMA in the Decision. In determining such an application, the Tribunal "shall apply the same principles as would be

[3] The Enterprise Act 2002 does not define the meaning of the test "substantial lessening of competition". The meaning of this test is something that we will have to consider in the context of this Judgment.
[4] Decision/Chapter 7.
[5] Decision/Chapter 8.
[6] Decision/§§11.125 and 11.133, and Decision/Chapter 11 generally.

applied by a court on an application for judicial review".[7] On 15 February 2022, the Tribunal ordered that these proceedings should be treated under rule 18 of the Competition Appeal Tribunal Rules 2015 (the "Tribunal Rules")[8] as proceedings in England and Wales.

12. By its application, Meta contends that the Decision was unlawful and void, alternatively falls to be quashed pursuant to section 120(5)(a) of the Enterprise Act 2002. The following paragraphs set out the summary of the grounds of review advanced by Meta in its Re-Amended Notice of Application (the "NoA") and draw substantially on the articulation of Meta's case in Section E of the NoA. We stress that we are here doing no more than setting out Meta's case: the fact that we do so implies, at this stage of our Judgment, neither approbation nor disapprobation. Obviously, the grounds of review advanced by Meta were opposed by the CMA.

13. Meta contended that the following factual matters were important by way of background:[9]

    (1) Prior to the Merger, GIPHY had no place of business in the UK and had never sold any advertising outside the US. The Decision's Horizontal SLC finding thus relied entirely on potential competition from GIPHY based upon "hypothetical speculation".

    (2) As to Meta's motivation for acquiring GIPHY, the Decision acknowledged that the CMA could not identify evidence that Meta perceived GIPHY as a potential competitive threat to it in display advertising. In short, there was no evidence to suggest that Meta's motivation for purchasing GIPHY was to eliminate GIPHY as a competitor in any advertising market or to foreclose or cut off rivals' access to GIPHY's products or services. There was no suggestion that either horizonal or vertical foreclosure was part of Meta's motivation for the Merger.

[7] Section 120(4) of the Enterprise Act 2002.
[8] SI 2015/1648.
[9] NoA/§17.

(3) Following the Merger, Snap, Inc. ("Snap") – one of Meta's closest social media competitors – purchased Gfycat, Inc. ("Gfycat"), a close competitor of GIPHY. This information, which had been in the possession of the CMA since 24 June 2020, was not revealed to Meta by the CMA until 25 August 2021, late in the consultation process leading to the Decision, and then only within the confines of the confidentiality ring (which only included Meta's external advisers). After the Decision was published, the CMA revealed to Meta – again, within the confines of the confidentiality ring – that Snap had plans to improve the quality of Gfycat's offering at some point in the relatively near future. The precise detail of these plans does not need to be gone into for the purposes of this Judgment.

14. Against this background, Meta advances the following grounds of review:

(1) *Ground 1: challenge to the finding that the Merger would result in a Horizontal SLC.* As to this, Meta contends that:

(i) The Decision contains no finding that it was probable that GIPHY would have become a meaningful competitor to Meta on any UK advertising market in the future. The Decision seeks to rely instead on a concept of "dynamic competition". Meta contends that the CMA misdirected itself in law as to the meaning of a substantial lessening of competition in section 35(1)(b) of the Enterprise Act 2002 and/or misapplied that test in finding that a substantial lessening of competition could arise from a loss of dynamic competition without an assessment of whether: *(a)* GIPHY would, on the balance of probabilities, have become a significant competitive threat on a relevant UK advertising market or markets; and *(b)* Meta (or other competitors) would, on the balance of probabilities, have responded to any such threat by materially changing their own competitive conduct or investment decisions on any such market(s) within a reasonable period; and/or

(ii) If, contrary to the foregoing, the Decision did reach such a finding, the CMA's finding was one which was not reasonably open to it and/or was made without making reasonable prior inquiries or assessments that any reasonable regulator would have made. In particular, even on the most optimistic projections for the volume of GIPHY's potential sales, such sales would not have constituted a material proportion of any advertising market globally or in the UK such that it was not plausible that GIPHY's presence would have had a material effect upon the conduct of competitors on any advertising markets in the medium term.

(2) *Ground 2: the CMA's finding that there was a Horizonal SLC contradicts or is inconsistent with the CMA's definition of the market on which it alleged Meta competes.* As to this, Meta contends that:

(i) There is a contradiction between the definition of the relevant market (in which market power is to be assessed) and the finding of a Horizonal SLC. This will involve a consideration of whether GIPHY's "Paid Alignment" advertising[10] competed in the same advertising market as Meta.

(ii) Logically, GIPHY's Paid Alignment advertising must either compete in the same market as Meta's advertising or in a different market. If GIPHY's advertising competed in a different market to Meta's advertising, then the finding of a Horizonal SLC is an unreasonable one.

(iii) If, on the other hand, GIPHY's advertising competed in the same advertising market as Meta, then:

> "this would contradict the Decision's definition of the "display advertising" market in which it is alleged that Meta competes. Instead, Meta would compete in a broader advertising market including (at least) products of the same nature as GIPHY (i.e. search-based advertising aimed at out-of-market customers). It follows that the finding that Meta has market power is based upon

[10] Described in paragraph 61 below.

> a definition of the relevant advertising market which no rational decision-maker could have reached consistently with the other findings in the Decision".[11]

(iv) Further and in any event, the CMA's finding of market power on the part of GIPHY was irrational and/or failed to take into account relevant considerations as to GIPHY's power over price.

(3) *Ground 3: The counterfactual used by the CMA in the Decision does not rationally follow from the CMA's findings of fact and is inadequately specified.* As to this, Meta contends that:[12]

> "… based upon its own findings of fact, the Decision could only rationally have concluded that, in the counterfactual world in which had Meta not purchased GIPHY, the most optimistic forecast is that GIPHY would have survived by way of a further round of funding from existing or third party investors at a significant discount (or 'down round') to the valuation of the company in the previous equity funding round. The Decision fails properly to investigate or reach any conclusion as to whether such a 'down round' would have led to profound difficulties with staff retention and reduced operations or, therefore, to an impediment to plans for monetisation, innovation and international expansion on the part of GIPHY."

(4) *Ground 4: The Decision is procedurally flawed and otherwise unlawful.* As to this, Meta contends that:

(i) The CMA acted unfairly and/or in breach of its duty to Meta under section 104 of the Enterprise Act 2002 in connection with its disclosure of, and evaluation of the consequences of, the acquisition by Snap of Gfycat. Further or alternatively, the CMA's conclusion that no new GIF-supplier would emerge in the near future as an effective alternative to GIPHY and Tenor was irrational. The CMA further failed to make inquiries of Snap, which any reasonable authority in its position would have made.

(ii) The Decision is vitiated by excisions which were *ultra vires* and/or amounted to an unlawful failure to give reasons. Large

[11] Quoting from NoA/§18(2)(a)(ii).
[12] Quoting from NoA/§18(3).

portions of the reasons for the Decision were redacted, even from the version provided to Meta's external advisers via the confidentiality ring set up for the purpose of the Merger investigation (the "Ring"). The excised material supplied to Meta's external representatives after the filing of the original NoA demonstrated further errors on the CMA's part.

(5) *Ground 4A: Unlawful delegation.* As to this, Meta contends:[13]

> "The Group's function under section 38(1) [of the Enterprise Act 2002] of preparing and publishing the Decision within the time limit for determination of the Merger reference was unlawfully delegated to the chairman of the Group, Mr McIntosh, in breach of section 34C(1) [of the Enterprise Act 2002] (and then sub-delegated to the [CMA's] staff), with the effect that the Decision is *ultra vires* and void in its entirety."

(6) *Ground 5: The CMA failed properly to assess the remedy it would have imposed in relation to the Vertical SLC in isolation and/or any option beyond the divestment of GIPHY by Meta.* As to this, Meta contends:[14]

> "… given that the theory for the Horizonal SLC is vitiated (see Grounds 1 to 4), there can be no reasonable basis to maintain the remedy set out in the Decision. Further or alternatively, the [CMA] acted irrationally and/or disproportionately and/or procedurally unfairly by requiring Meta to divest itself of GIPHY as a remedy for the Vertical SLC. In particular, the Decision fails to have regard to the important consideration that, further to its acquisition of Gfycat, Snap plans to improve that company's offering […] by [a date in the relatively near future] without significant degradation to its user experience (and Snap considered it had the ability to remove its dependency on GIPHY sooner than 2022); this removes the need for any form of divestment remedy or renders any such remedy manifestly disproportionate."
>
> (This is a passage that we have redacted and altered (as evidenced by the square brackets) in a manner that *(a)* does not affect the meaning of this Judgment in any way, but *(b)* preserves third party confidentiality.)

(7) *Ground 6: Errors regarding remediation.* In determining the remedy for the findings of substantial lessening of competition, Meta contends that the CMA:

---

[13] Quoting from NoA/§18(4A).
[14] Quoting from NoA/§18(5).

(i) Acted irrationally and/or disproportionately by requiring Meta to provide at least US$75 million in cash to GIPHY.

(ii) Acted *ultra vires* section 35(3) of the Enterprise Act 2002, alternatively irrationally and/or disproportionately, by requiring any purchaser of GIPHY to show a commitment to developing and providing GIF-based advertising in the UK.

(iii) Acted *ultra vires* section 35(3) of the Enterprise Act 2002, alternatively irrationally and/or disproportionately, in requiring Meta to enter into an agreement with GIPHY for the supply of GIFs.

(5) Interventions

15. The Tribunal permitted three interventions, from the Application Developers Alliance, the Computer & Communication Industry Association and Privacy International, collectively the "Interveners". The interventions were limited to the making of written submissions. Although the Tribunal retained the option of hearing from any or all of the Interveners at the hearing, the Tribunal did not consider receiving oral submissions from any of the Interveners to be necessary.

(6) Material before the Tribunal

16. This is a judicial review of the Decision, and (consistent with that process) no oral evidence was heard by the Tribunal. The primary source of fact, and the primary document under consideration, was of course the Decision. The attack on the Decision was set out in the NoA, and the various grounds of review have already been set out. In addition to the NoA, we had before us the following pleadings:

(1) An Amended Defence from the CMA.

(2) An Amended Reply from Meta.

(3) Statements of Intervention from the Interveners, Responses thereto from both Meta and the CMA and Replies from the Interveners.

17. Statements from the following persons:

(1) Four witness statements from Mr McIntosh, the Chair of the Group, given on behalf of the CMA. We shall refer to these respectively as "McIntosh 1" (dated 31 January 2022), "McIntosh 2" (dated 4 March 2022), "McIntosh 3" (dated 25 March 2022) and "McIntosh 4" (dated 28 April 2022).[15]

(2) Witness statements – again on behalf of the CMA – from the three other members of the Group, Ms Daly, Mr Cohen and Mr Rose. These statements were all dated 25 March 2022.

18. Additionally, we were referred to various other documents relating to the Merger and the Merger investigation, to which we will make more specific reference in the course of this Judgment.

(7) Structure of this Judgment

19. During the course of this hearing, the parties grouped the grounds of review into three categories. The first group concerned substantive challenges to the Decision and comprised Grounds 1, 2 and 3. The second group concerned procedural challenges to the Decision and comprised Grounds 4 and 4A. The third group concerned remediation issues and comprised Grounds 5 and 6. We found this parsing of the grounds of review to be helpful, and adopt it. Accordingly, Section B below considers what we will refer to as the "Substantive Challenges"; Section C below considers what we will refer to as the "Procedural Challenges"; and Section D below considers what we will refer to as the "Remediation Challenges".

[15] McIntosh 4 was very much a formal, confirmatory, statement produced by Mr McIntosh at the request of the Tribunal.

20. So far as the Remediation Challenges are concerned, both Meta and the CMA recognised that certain points arising in respect of these grounds of review were, to a degree, contingent upon the outcomes of the anterior grounds of review in the Substantive Challenges and the Procedural Challenges. We consider that to be right, and accept that we will not be able, in this Judgment, to deal with each and every point that arises out of the Remediation Challenges. We will determine those points that we properly can; to the extent that other points continue unresolved, because they require further argument based upon the findings that we have made, these will fall to be determined at a separate hearing.

21. Section E draws together our conclusions, disposes of the application and addresses certain consequential matters.

B. THE SUBSTANTIVE CHALLENGES

(1) Introduction

22. The Decision found a relevant merger situation to exist, and that finding is not sought to be reviewed. Nor is the finding that there was a Vertical SLC sought to be reviewed, although it was Meta's position that that finding could not stand if Meta were to succeed in relation to certain of its other grounds of review. The extent to which the finding as regards the Vertical SLC can stand in light of this Judgment is considered in Section D below.

23. Grounds 1, 2 and 3 all go to the finding that the Merger would result in a Horizonal SLC, and to that extent they are related. Before we set out how we are going to address these grounds, we address – we hope uncontroversially – certain aspects of the substantial lessening of competition test.

(2) The substantial lessening of competition test

24. We consider the following points to be uncontentious in any conventional application of the substantial lessening of competition test. We will consider

later – because it is central to the Substantive Challenges – the extent to which this case can properly be said to be conventional:

(1) A substantial lessening of competition does not have to be large, considerable or weighty in order to be substantial: *Global Radio Holdings Limited v. Competition Commission*[16] ("*Global Radio*") at [23] to [25]; *Tobii AB (Publ) v Competition and Markets Authority*[17] at [340] and [392]. In *Global Radio* the Tribunal said this:[18]

> "The effect of the filters for which sections 22 and 23 of the [Enterprise Act 2002] provide is that a merger situation is only referred to the Commission under section 22 where (a) a transaction is of such scale as to meet one or both of the turnover and share of supply tests to be found in section 23 and (b) the OFT has not decided against a reference under section 22(2) on the basis that customer benefits outweigh any substantial lessening of competition and its adverse effects on the relevant market are not of sufficient importance. It cannot be assumed that Parliament intended the Commission to be able to intervene in merger situations satisfying these criteria only if there were a "large" lessening of competition in absolute terms. To the contrary, Parliament might be anticipated to have intended that a significant lessening of competition should suffice, regardless of whether the lessening of competition was large in absolute terms …"

It is unwise to seek to unpack the wording of a statute that has not, further, been legislatively defined. Meta sought to re-word the test as a "lessening of competition of real significance on the relevant market and, ultimately, to consumers".[19] We doubt if any reformulation is wise to attempt, and consider this one to be unduly stringent and inconsistent with the view expressed in *Global Radio*.

(2) There is no pre-defined measure for ascertaining whether there has, or has not been, a "substantial lessening of competition". It is perfectly proper, when considering this test, to focus on any number of metrics, facts and matters when determining whether competition has been lessened. Commonly used measures or metrics are market share or number of competitors remaining in the market. But there is no single defined approach.

---

[16] [2013] CAT 26.
[17] [2020] CAT 1.
[18] At [24(3)].
[19] See, e.g., NoA/§23.

(3) The words "substantial lessening of competition" do not appear in the abstract in section 35(2)(a) of the Enterprise Act 2002. The statutory wording is as follows:

> "… a substantial lessening of competition within any market or markets in the United Kingdom for goods or services …"

Two points emerge very clearly from this. First, it is important to define the relevant market or markets. Unless such a market definition is carried out, it is difficult to assess whether there has been a substantial lessening of competition.[20] Secondly, there is a geographic dimension as regards the market or markets that are relevant to this assessment: the "substantial lessening of competition" must be "within" a market or markets "in the United Kingdom".

(4) In order to assess the effects of a merger, and whether it will give rise to a substantial lessening of competition, the CMA is entitled to, and does, use certain analytical tools. Indeed, it may be said that market definition is itself such a tool. Two other tools, worth mentioning now because of the manner in which the Substantive Challenges have been framed are *(a)* the theory of harm and *(b)* the counterfactual. As to these:

(i) A theory of harm is just that. It is an articulation of the CMA's overt thought processes as to how a given event – the merger under review – results in a given adverse outcome – the substantial lessening of competition. The theory of harm is important because it acts as a filter or control for relevant or irrelevant facts that the CMA must satisfy itself in relation to. Thus, one theory of harm may require the CMA to satisfy itself in relation to certain facts and matters which simply do not arise

[20] We stress that we are here expressly considering only the conventional case: see the opening words of this paragraph. The Decision states at Decision/§5.5 that "our analysis does not seek to conclude on a bright-line definition of the relevant markets, but instead describes the competitive framework within which the Parties and their rivals operate." Clearly, as these words indicate, the Decision adopts an unconventional approach. We will consider, in due course, the nature of that approach and the extent which it can be justified. We would not, however, want it to be suggested that merely because we have set out, as clearly as we can, the conventional approach, that any different approach is wrong. That would be an altogether too rigid stance, and one that we would not endorse.

if a different theory of harm were to be selected. The CMA's "Merger Assessment Guidelines"[21] provide:[22]

> "The CMA assesses the potential competitive effects of mergers by reference to 'theories of harm'. A theory of harm is a hypothesis about how the process of rivalry could be harmed as a result of a merger. Theories of harm provide a framework for assessing the effects of a merger and whether or not it could lead to [a substantial lessening of competition] relative to the counterfactual."

(ii) A counterfactual obliges the CMA to consider the real world – the world in which the merger has occurred or is going to occur[23] – as against the counterfactual world – the world in which the merger has not taken, or will not take, place. The difference between these two worlds is informed by the theory of harm, and it is only where that difference amounts to a "substantial lessening of competition" in the "real world" that the statutory test is met.

(3) Approach

25. Turning, then, to the Substantive Challenges to the Decision, we will begin with Ground 2, because that involves a challenge to the market definition identified by the CMA in the Decision, and logically falls to be considered first, given the conventional approach that we have described. We then describe the theory of harm that we understand the CMA to have articulated in the Decision (as neutrally as we can) before proceeding to consider Ground 3, which relates to and challenges the counterfactual used by the CMA to find a substantial lessening of competition. Finally, we consider Ground 1, which is a challenge to the CMA's finding of a Horizontal SLC.

26. This will involve us in some consideration of dynamic competition, which underpins large parts of the Decision,[24] and which is to be contrasted with "static

[21] Published 18 March 2021, CMA129.
[22] Paragraph 2.11.
[23] Some mergers are assessed prospectively. That is not the case here, but where a prospective merger is being considered, both the "actual" and the "counterfactual" assessments require a degree of hypothesis.
[24] See, for example, Decision/§§5.4, 7.10, 7.12, 7.249*ff*.

competition". We propose to consider the Decision's understanding of dynamic competition first, in Section B(4) below, because of its prevalence in and the extent to which it underpins the Decision's thinking. Whilst the reference to dynamic competition is most frequent in Decision/Chapter 7 on "Horizontal Effects", it also (by way of example) affects the approach to market definition in Decision/Chapter 5:[25]

> "5.3 Market definition involves identifying the most significant competitive alternatives available to customers of the merger firms and includes the sources of competition to the merger firms that are the immediate determinants of the effects of the merger.
>
> 5.4 In this case, the relevant products of the Parties and their rivals are complex, differentiated and include recent (and forthcoming) product developments. The potential issues under analysis relate in various ways to how competition between the merging Parties and their rivals will dynamically evolve over time. In these circumstances, the CMA will place more emphasis on the competitive assessment than on static market definition. In its assessment of the impact of the Merger on competition, it will consider evidence on concentration measures alongside evidence of closeness of competition. This involves assessing the strength of the current and likely future constraints between the products of the merging Parties and their rivals. Evidence on concentration and on closeness of competition can be interpreted and taken into account without the need for a precise definition of the relevant markets.
>
> 5.5 Accordingly, our analysis does not seek to conclude on a bright-line definition of the relevant markets, but instead describes the competitive framework within which the Parties and their rivals operate. This is used to inform the assessment of competitive effects of the Merger, as set out in Chapter 7, Horizontal Effects and Chapter 8, Vertical Effects."

27. Thereafter, we consider (in Section B(5)) the (logically) first of the Substantive Challenges to the Decision, namely that relating to market definition as articulated in Ground 2 of the NoA. Section B(6) sets out briefly what we understand to be the theory of harm in the case of the horizontal SLC: this is largely implicit in the Decision, but it is important to be clear. Section B(7) then considers Ground 3, which concerns the counterfactual used in the Decision.

[25] Emphasis added.

(4) Dynamic competition

(a) Introduction

28. A persistent theme of Mr Jowell, QC's submissions on behalf of Meta was that, whilst a substantial lessening of dynamic competition was a matter capable of falling within the statutory regime for the control of mergers, it could not be used as an effective *carte blanche*, such that a substantial lessening of competition arose – Humpty Dumpty-like[26] – whenever the CMA merely asserted it existed. Mr Holmes, QC, for the CMA unsurprisingly accepted that *carte blanche* or an effectively unpoliced discretion was not what the CMA was contending for.

29. In order for decisions like the present to be reviewable, there must be objective criteria that can be used to evaluate the rationality, lawfulness and proportionality of the decision in question. It is accordingly important to understand these terms of art and, most importantly, the manner in which the Group making the Decision understood them. Only then is it possible to consider the legality of the various decisions made.

(b) Static, potential and dynamic competition

30. Competition, and impairments to competition, need to be understood as subsisting on a spectrum. Most straightforward to understand is static competition, which (in the merger context that we are here concerned with) involves consideration of the market as it is. Thus, if one defines a market in widgets, with three competitor widget manufacturers with market shares of 60%, 25% and 15% respectively, and the biggest manufacturer seeks to acquire the smallest, resulting in a 75% market share in the to be merged entity, one can easily see how a competition authority might have concerns. The analytical framework is relatively easy to state, and relatively easy to apply and (most importantly in this context) to justify.

---

[26] Carroll, *Through the Looking Glass*: ""When I use a word", Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean – neither more nor less.""

31. "Potential competition" moves away from the as it is of static competition, and focuses on the potentialities that exist in or arise out of the static case. Thus, to vary the example that we have just given, suppose a widget market with 10 widget manufacturers, each with a 10% market share. Absent additional facts justifying intervention, it is difficult to see why a competition authority would have concerns if one (10% market share) manufacturer were to acquire another (10% market share) manufacturer.

32. We stress that we are speaking hypothetically,[27] and that such a merger might be susceptible to control even on a static analysis. But the point of our example is to suggest that, in this case, regulatory intervention would only be justified where a threat to or weakening of potential competition is identified. Suppose it is the case that the two merging entities – at present only having 10% market shares each – are actually both on a trajectory (because of efficiencies of cost or better produced widgets: the reason does not matter) significantly to expand their market share in the future, such that each has the potential for a market share in the relatively near future of 40% each. The example is extreme, but the point is clear: if the merger is facilitating a firm that will, in the relatively near future, have a market share of 80%, the competition concerns and the objections to the merger are again obvious.

33. Justifying intervention in a case of potential competition is, however, harder than in the case of static competition. The reason is, again, obvious. Instead of simply reaching a conclusion about existing market shares (which will be important in any event) it will be necessary for the intervening competition authority to reach a view – and to have a proper basis for it – regarding (in this example) the expansion potentiality of the two merging firms.

34. Dynamic competition involves a much more fluid form of competition between innovating firms. So far, our examples have been drawn from forms of horizonal mergers between firms in the same market. But vertical integration – and the threats to competition that this may entail – is capable of similar static and/or

[27] As we have stated, market share is a possible, but not inevitable criterion to use. All of these examples are entirely illustrative.

potential analysis as in the case of our horizontal examples, and we are not going to multiply our examples unnecessarily. The point is that, in the case of either static or potential competition, there is a framework of analysis, based upon the existing competition in the market or that which may subsist in the relatively near future, that is (at least relative to dynamic competition) easy to state and apply.

35. This is much less true in the case of dynamic competition, which involves a far greater consideration of innovation and invention – in short, potentiality – rather than analysis of an existing market or an assessment of the future trends that lie within it.[28] Jorde and Teece put the point in the following way:[29]

> "As Schumpeter (1942) suggested … , the kind of competition embedded in standard microeconomic analysis may not be the kind of competition that really matters if enhancing economic welfare is the goal of antitrust. Rather, it is dynamic competition propelled by the introduction of new products and new processes that really counts. If the antitrust laws were more concerned with promoting dynamic rather than static competition, which we believe they should, we expect that they would look somewhat different from the laws we have today."

36. In the abstract to an article in the Journal of Competition Law & Economics, Sidak and Teece say this:[30]

> "How would competition policy be shaped if it were to explicitly favour Schumpeterian (dynamic) competition over neoclassical (static) competition? Schumpeterian competition is the kind of competition that is engendered by product and process innovation. Such competition does not merely bring price competition. It tends to overturn the existing order. A "neo-Schumpeterian" framework for antitrust analysis that favours dynamic competition over static competition would put less weight on market share and concentration in the assessment of market power and more weight on assessing potential competition and enterprise-level capabilities."

37. At this stage, it is worth making three points regarding dynamic competition:

---

[28] Self-evidently, we are not saying that innovation, invention and potentiality are irrelevant when considering potential competition or even static competition. That would be inconsistent with our definition of potential competition in paragraph 31 above, and contradict the point made in paragraph 30 that these forms of competition exist on a spectrum. In short, the difference between static, potential and dynamic competition is not absolute but one of degree. Provided this is borne in mind, the labels are helpful.

[29] Jorde and Teece (eds), *Antitrust, Innovation and Competitiveness* (1st ed, Oxford University Press, 1992) at 5.

[30] Sidak and Teece, 'Dynamic Competition in Antitrust Law' (2009) 5(4) Journal of Competition Law & Economics 581-631, at 581.

(1) First, the temporal aspect that differentiates static from potential competition is an unhelpful one to draw in the case of dynamic competition. The facts and matters that render competition dynamic will likely be present in the market at the time of regulatory intervention, but they will not necessarily have manifested themselves.

(2) Secondly, the traditional tools of analysis (concentration, market share, market definition, etc) are less likely to be determinative than in the case of static or potential competition.

(3) Thirdly, identifying the criteria that are relevant for determining whether a state of dynamic competition exists and, if so, whether a merger weakens that competition, is extremely difficult. It is certainly the case that, with the benefit of hindsight, "one knows it when one sees it",[31, 32] but that is of scant comfort to the competition authority who must consider the issue in advance, without the benefit of hindsight; and – in this jurisdiction at least – be able to justify the conclusion it reaches on a judicial review.

(c) Does weakening of "dynamic competition" count for purposes of the Enterprise Act?

38. We consider that a weakening of dynamic competition is capable of being sufficient to justify a finding of substantial lessening of competition within the meaning of section 35(2)(a) of the Enterprise Act 2002, which provides that there is an anti-competitive outcome if "a relevant merger situation has been created and the creation of that situation has resulted, or may be expected to

---

[31] To quote Justice Potter Stewart in his threshold test for obscenity in *Jacobellis v. Ohio*, 378 US 184 (1964) in the US Supreme Court: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [i.e. hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But *I know it when I see it*, and the motion picture involved in this case is not that."

[32] With hindsight firmly engaged, the manner in which Kodak failed (declaring bankruptcy in 2012), because of over-emphasis on consumer film cameras, which required delayed processing and were expensive in terms of materials (film) and processing cost, in the light of the arrival of digital cameras in mobile phones (specifically the iPhone), is a case in point. It is not that Kodak did not develop a digital camera (it did, inventing it in the mid-1970s), it is that an altogether different product, a communications device, invaded its market for consumer "point and shoot" products.

result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services". The wording in section 35(1)(b) is materially the same.

39. We consider that these words are clearly wide enough to include, as an anti-competitive outcome, a substantial lessening of competition arising through an impairment of dynamic competition. This was not disputed by Meta. Meta accepted that the statutory test extended so far, but stressed that this fact could not be used to avoid satisfying the key statutory test of a substantial lessening of competition:[33]

> "23. The adjective "*substantial*" is an important qualification to the requirement that there must be a "*lessening of competition*" within any UK market. The consequences of an affirmative answer to the question in section 35(1)(b) [of the Enterprise Act 2002] are potentially grave. They … include forced divestment of property … The adjective "*substantial*" requires not only that the [CMA] assess whether it is more likely than not that there will be a lessening of competition, but also that any such lessening of competition be of real significance on the relevant market and, ultimately, to consumers.
>
> 24. In cases where there is currently no existing competition on the UK market in question but only a potential for future competition, as the Decision finds in the present case, the requirement that the potential competition that has been lessened should be "*substantial*" is all the more important. A hypothetical possibility of an insubstantial lessening of future competition that is itself speculative will clearly not suffice. Nor will potentially lessening in the very long term suffice; given long enough, anything can happen. Where competition is entirely "*potential*" in character there is a greater need to establish that the potential competition would likely have substantial effects on the market in question, if realised.
>
> 25. The Decision's finding of a Horizontal SLC turns upon the concept of so-called "*dynamic competition*". This concept features nowhere in [the Enterprise Act 2002] and is nowhere clearly defined in the Decision itself. In summary, however, it appears that the concept of "*dynamic competition*" as used in the Decision refers to the process by which the competitive threat posed by an actual or future competitor may change the way that existing firms on the relevant market operate by stimulating those existing firms to improve their own competitive offering or to invest, in ways which those existing firms would not have done absent the existence and threat posed by the "*dynamic*" competitor.
>
> 26. Meta does not dispute that the [CMA] was entitled to have recourse to a concept of "*dynamic competition*" as so understood. However, such

[33] Quoting from the NoA.

> a concept cannot lawfully displace the statutory requirement in section 35(1)(b) [of the Enterprise Act 2002] that the lessening of competition be "*substantial*". The concept of "*dynamic competition*" must be understood and applied consistently with that requirement; any loss of dynamic competition must still be a "*substantial*" loss of competition (*i.e.* of real significance on the relevant market and, ultimately, to consumers).
>
> 27. The [CMA] erred in law by apparently considering that, provided only that it can posit "*dynamic competition*", it is entitled to ignore the requirement of establishing on the balance of probabilities that there would be a "*substantial*" lessening of competition. … [The CMA] appears to consider that, where there is a potential for dynamic competition and an incumbent with alleged significant market power, it would suffice to show *any* potential lessening of competition or a mere prospective possibility of a future SLC. That is a clear misinterpretation of [the Enterprise Act 2002] and/or a clear and unlawful misapplication of it."

40. We do not consider that the CMA was contending that anything other than the statutory test needed to be complied with. It was the CMA's position that that test was complied with by the Decision's findings in relation to dynamic competition. That assertion is, of course, the subject-matter of these grounds of review. The only point we would additionally make, in response to the suggestions by Meta that the Decision only finds a future impairment of competition is that, on its face, the Decision finds that the Merger "has resulted or may be expected to result" in a substantial lessening of competition.[34] However, for the reasons we have given,[35] the distinction between "present" and "future" dynamic competition is not a particularly helpful one.

(5) Ground 2: market definition

(a) Introduction

41. In paragraph 24(3) above, we noted the importance of market definition. Market definition, we stress, is a tool intended to assist in reaching a properly based outcome. There are subsidiary tools – the hypothetical monopolist and SSNIP tests – intended to assist in market definition. It is not necessary to consider how

[34] See, for example, Decision/§65. Decision/§7.4 is more ambiguous: "…our view is that the Merger will lead to a **substantial lessening of competition in the supply of display advertising services in the UK arising from a loss of dynamic competition**" (emphasis in the original).
[35] See paragraph 37 above.

these subsidiary tools might be used because, as is clear from Decision/§§5.3 to 5.5 (quoted in paragraph 26 above) the Group did not follow the process that we have described as conventional in paragraph 24 above. That is because the Group considered itself to be investigating a case of a merger impairing dynamic competition. The question is whether those departures from the conventional can be justified on a judicial review. Before approaching this question, it is necessary to state what the Decision concluded in terms of market definition.

(b) The approach taken in the Decision

(i) Identification of relevant products and markets

42. The Decision began by identifying the relevant products, which in this case were all services.[36] The Decision identified three relevant services:

(1) The supply of searchable GIF libraries.[37]

(2) The supply of social media.[38]

(3) The supply of display advertising.[39]

43. We consider the nature of these three services in the following sections.

Supply of searchable GIF libraries

44. A video GIF is a digital file that displays a short – typically 2½-second long – looping soundless video, which can be used to convey emotions or as a way of demonstrating an understanding of popular culture (e.g. clips from TV shows).[40] A GIF sticker displays an animated image comprised of a transparent or semi-transparent background which can be placed over images or texts.[41]

[36] Decision/§5.6.
[37] Decision/§5.6(a).
[38] Decision/§5.6(b).
[39] Decision/§5.6(c).
[40] Decision/§4.6.
[41] Decision/§4.6.

45. GIFs[42] are typically used as part of communication in social media or messaging applications.[43] We will refer to the persons using GIFs in this way as "GIF Consumers". Although GIF Consumers would – in normal circumstances – be regarded as buyers of services, GIF Consumers do not pay to use GIFs.[44] When GIFs are used by GIF Consumers as part of another service, GIF Consumers can, but generally do not, at least when using that other service, access GIFs via GIF-provider owned and operated channels.[45] Thus, GIPHY's library of GIFs can be accessed directly (via the GIPHY website or application ("App")[46]), but if a GIF Consumer is (say) sending a message via a third-party App, the consumer is most unlikely to use this direct provision of GIFs. Rather, the GIF Consumer will access GIFs indirectly, using a functionality built into the third-party App. GIPHY provides Application Programming Interfaces ("APIs") and Software Development Kits ("SDKs") and no doubt other means to facilitate this. It is quite clear from the Decision that a substantial part of GIPHY's business model is based upon this indirect provision of GIFs by it.[47]

46. So far, we have been considering the provision (which the Decision describes as distribution) of GIFs to GIF Consumers.[48] Prior to provision or distribution, the "GIF Provider" (as we shall refer to it) must:

    (1) Source, moderate and host a library of GIF content.[49]

    (2) Provide – or in some other way make available – a search algorithm to identify relevant content responsive to users' search queries, as well as displaying content in a user-friendly way.[50]

---

[42] Save where the contrary is stated, or the context otherwise requires, all references hereon to GIFs are to video GIFs and GIF stickers.
[43] Decision/§4.8.
[44] Or at least not directly or overtly. There is, as economists often say, no such thing as a free lunch. We will explore how GIF Consumers "pay" in due course.
[45] Referred to in the Decision as "O&O" channels, an abbreviation we shall not adopt, but which we do note.
[46] See, e.g., Decision/§2.5.
[47] See Decision/§§2.4 to 2.5, 4.10(c) and 4.32 to 4.34.
[48] Decision/§4.10(c).
[49] Decision/§4.10(a).
[50] Decision/§4.10(b).

47. Generally speaking, the library content and the means of searching it will be the same, whether the searchable GIF library is provided directly or indirectly.

48. It is best, at this point, to identify the most relevant GIF Providers, namely:

(1) GIPHY itself.

(2) Tenor, which is owned by Google and is GIPHY's only close competitor.[51]

(3) Gfycat, which has been acquired by Snap, and although it is considered to be one of the three main GIF Providers, it does so to a lesser extent than GIPHY and Tenor.[52]

49. So far as GIF Consumers were concerned, the Decision concluded that there was no immediate substitutability between GIFs and GIF stickers. They were used by GIF Consumers in different ways, and would not automatically be regarded as substitutes.[53] The Decision states:[54]

> "… we consider that, on the demand side, video GIFs and GIF stickers have different uses and, as such, demand-side substitutability may be somewhat limited."[55]

50. There was also limited substitutability as between GIFs and other types of content aimed at driving user engagement on social media:[56]

> "We found that GIFs do not appear to be closely substitutable with these other types of content."

And:[57]

> "… we found that GIFs have distinctive characteristics that make them less likely to be substitutable with other creative content (such as emojis, animojis, and avatars). We found that GIFs: (i) are short, looping, soundless videos, often

[51] See Decision/Summary/§§27 and 44(f) and Decision/§5.71.
[52] See Decision/§§4.58 to 4.59 and 5.41.
[53] Decision/§5.19.
[54] Decision/§5.20.
[55] The CMA found that, on the supply side, all the larger GIF Providers supplied both video GIFs and GIF stickers, and that (on the supply side) the two types could be considered together: Decision/§5.21.
[56] Decision/§5.25.
[57] Decision/§5.27. See, further, Decision/§5.28.

including a caption; (ii) often demonstrate an understanding of popular culture (with many being clips from TV shows, movies, sport events, etc); and (iii) allow for richer user expression (than a static picture or symbol, for example)."

51. In terms of the geographic demand for GIFs, the Decision stated:[58]

> "5.41 We recognise that the demand for GIFs may vary between countries, reflecting these cultural and linguistic differences, and that this may lead to some differentiation in the content provided by global GIF suppliers in different countries and, potentially, the emergence of country/region-specific suppliers, particularly in China and some other Asian countries. However, from a UK customer's perspective, the alternatives available are the same as in the US and include the three major suppliers (GIPHY, Tenor, and Gfycat) whose content is principally oriented towards a Western and English-speaking audience.
>
> 5.42 Based on this evidence, we have concluded that the effects of the Merger should be assessed on the **supply of searchable GIF libraries globally**, while leaving the precise geographic market definition open. We consider that our competitive assessment and its conclusions would not change if we were to consider a narrower geographic frame of reference (eg Western or English-speaking countries)."

Supply of social media

52. Decision/§5.96 quotes from a CMA "Online platforms and digital advertising" market study published on 1 July 2020 (the "CMA Market Study"), which describes social media platforms in the following terms:

> "Social media platforms facilitate interaction between their users, allowing them to communicate with each other, and share and discover engaging content. Social media platforms are generally available through a mobile app, with some also available via a web browser … Features commonly provided by social media platforms include: user profiles or accounts; user 'friends' or connections; a personalised 'feed' of news or other content; content sharing features; comments; private messaging features; and likes or 'reactions'."

53. GIFs are particularly used within private messaging, which is itself an important feature of social media platforms.[59]

54. There are, of course, many social media platforms. The consumers of social media ("Social Media Consumers") again generally get to use these platforms

[58] Emphasis in the original.
[59] Decision/§5.97.

for "free".[60] "Social Media Providers" compete for their attention in the following ways:[61]

(1) Size and type of user network.

(2) Content.

(3) Innovative features.

(4) Ad load and quality of advertising.

(5) Privacy.

(6) Platform governance (moderating content to prevent negative content from degrading user experience).

(7) Price (most platforms provide services to consumers at zero monetary cost).

55. The CMA considered whether this particular market (the market for social media) should be defined more widely[62] and concluded it should not be.[63] In this market, the Decision concluded that Meta had significant market power.[64]

Display advertising

56. It is significant, in terms of this application, that the Decision identifies the third service not as "advertising", nor as "digital advertising", but as "display advertising". It is important to understand what was meant by this. The Decision identifies "three board types of digital advertising":[65]

[60] See paragraph 45 above.
[61] Decision/§5.99.
[62] Decision/§§5.121*ff*.
[63] Decision/§5.124.
[64] The reasoning is at Decision/§§5.127*ff*, and the conclusion expressed at §5.154.
[65] Decision/§5.156.

> "(a) **Search advertising** – where advertisers pay online companies to link their company website to a specific search word or phrase so that it appears in relevant search engine results.
>
> (b) **Display advertising** – where advertisers pay online companies to display advertising using a range of advertising content types shown within defined ad units on web pages or mobile apps.
>
> (c) **Classified advertising** – where advertisers pay online companies to list specific products or services on a specialised website serving a particular market segment. This type of advertising accounts for a small proportion of digital advertising."

The terms "search advertising" and "display advertising" are both terms that we adopt.

57. We will leave to one side classified advertising, as it is a form of advertising not material to the Decision or this Judgment. As regards search advertising and display advertising, it is appropriate to add a little more to the description provided in the Decision. At our invitation, and very helpfully, both parties assisted with this during the course of their oral submissions. Thus:

(1) Google is a well-known search engine, which lists "hits in response to search terms or parameters input by a user (who, as with many digital platforms, uses the service for "free"). Although many of the "hits" produced in response to a search are simply appropriate links in response to the search terms input by the user, some "hits" (generally the first few and generally identified as such) are paid for (via an on-line auction conducted in micro-seconds). The level of bidding is informed (apart from the price the advertiser is willing to pay) by the nature of the search term input by the user and other data regarding that user. Advertising so paid for is search advertising.

(2) Display advertising, on the other hand, is much more like traditional advertising, in that space on a medium is traded for money. Thus, in digital advertising, part of the screen – be it mobile device, tablet or computer screen – is taken up with advertisement. The innovation is that content is again auctioned, and whose advert appears in the digital space will be informed partly by willingness to pay and partly by the digital footprint of the user.

58. The Decision draws a distinction between search advertising and display advertising. It draws from the views of participants of the CMA Market Study that search advertising is primarily intent-based advertising designed to provide immediate answers to consumers who have already shown interest in a product, whereas display advertising primarily raises brand awareness and reaches new audiences that might not yet have shown interest in a product.[66] The Decision concludes that "for most advertisers there is a distinction between display and search, and that search advertising is not a close substitute for display advertising".[67] For the reasons given in Decision/§§5.164*ff*, the Decision concludes that the defined market is display advertising, and that it is neither wider nor narrower than this. The market's geographic scope was that of the UK;[68] and within this market, the market for display advertising, Meta had significant market power.[69]

(ii) Conclusions and GIPHY's Paid Alignment advertising

Introduction

59. Apart from defining the three markets – the supply of searchable GIF libraries, the supply of social media and the supply of display advertising – and considering the nature of GIPHY's Paid Alignment advertising (to which we will come), Chapter 5 of the Decision actually reaches no further conclusions. The findings made as to market definition, as we have recorded them, are not subject to any attack in the NoA. Rather, the nature of the attack in Ground 2 is that – given the markets defined by the CMA in the Decision, and given the nature of Paid Alignment as not sitting within any of these markets – there was a fundamental flaw in the Decision which was, inherently, self-contradictory.

60. We will consider this contention in due course. For the present, we consider the nature of GIPHY's Paid Alignment advertising and its place inside or outside the markets defined by the CMA.

---

[66] Decision/§§5.164 and 5.165.
[67] Decision/§5.170.
[68] Decision/§5.185.
[69] Decision/§5.197 sets out the conclusion. The reasoning is in the preceding paragraphs.

Paid Alignment advertising

61. Pre-merger, GIPHY offered a form of advertising referred to as Paid Alignment advertising. This involved:[70]

> "… an advertiser paying GIPHY to make the advertiser's GIF, or a set of GIFs, more prominent in the search results associated with certain search terms, and/or more prominent in the trending GIF feed …"

62. One of the questions addressed in the Decision was whether Paid Alignment was search advertising or display advertising. The CMA considered that the promotion of branded GIFs within GIPHY's trending feed appeared more closely aligned to the concept of display advertising since these advertisements are displayed to users without them entering any search terms. Nonetheless, the content in GIPHY's trending feed is – although based in part upon popular searches – generic and not connected to the searches or intent of each particular user.[71] The Decision reached the following conclusion:[72]

> "GIPHY's advertising product was novel and did not necessarily fall neatly into any single pre-existing advertising category. However, based on the evidence set out above, we have concluded that **the type of advertising that GIPHY was developing prior to the Merger through its Paid Alignment services would have been a close substitute for display advertising services of the type offered by [Meta]**. In our competition assessment, we refer for convenience to GIPHY's entry and expansion in display advertising. To be clear, this reflects our view that GIPHY's Paid Alignment service is a close substitute to [Meta's] display advertising services, regardless of whether the service should be categorised as 'display advertising'."

63. The geographic scope of this product with no defined market was the UK.[73]

(c) The attack on the Decision in Ground 2

64. We have set out the substance of Ground 2 in paragraph 59 above. We consider that a reviewing body like this Tribunal ought to proceed with caution in vitiating a decision of a competition authority on grounds that the decision-maker has got market definition wrong. That is for two, related, reasons:

---

[70] Decision/§5.175.
[71] Decision/§5.178.
[72] Decision/§5.182. Emphasis in the original.
[73] Decision/§5.185.

(1) First, a competition authority has a margin of appreciation in defining markets, which this Tribunal will respect, even in the case of an on the merits review. This is the position *a fortiori* where the review is not by way of appeal, but by way of judicial review, where the decision on market definition can only be set aside on judicial review grounds.

(2) Secondly, market definition is no more than a tool, serving as part of the test for determining whether the substantial lessening of competition test, described in paragraph 24 above, has been met.[74] It is perfectly possible to reach a proper conclusion on a question of competition law, even if the market definition is wrong. In such a case, however, an "on the merits" review is actually kinder to the decision under appeal, than where the review is by way of judicial review. In an on the merits appeal, it is open to the Tribunal to hold that although the market definition of the competition authority was wrong (i.e. that even if the margin of appreciation was exceeded), the decision can still stand, because (applying the correct market definition) the decision is still correct on the merits. In the case of a judicial review, if the market definition adopted fails according to the standard of judicial review (e.g. if it is irrational or materially takes account of irrelevant considerations or fails to take account of relevant material considerations) then there is no prospect of "curing" the problem by an "on the merits" analysis. That is simply not a course open to the Tribunal.

65. If this case involved a finding of a significant lessening of static[75] competition in the display advertising market due to horizontal effects,[76] then we consider that it is quite possible that we would be setting aside the decision in relation to market definition on one or more grounds of irrationality, unreasonableness and/or taking into account immaterial and irrelevant considerations. That is because the assessment conducted by the CMA in the Decision would have failed to put the decision-maker in any kind of position to ascertain whether there had been a substantial lessening of competition. Although we appreciate,

[74] The role of market definition within this test is specifically described in paragraph 24(3).
[75] We have defined what this means in paragraph 30 above.
[76] See Decision/Summary/§17(a).

of course, that the CMA did not regard this as a case of static competition, it is nevertheless appropriate to consider why we would likely have reached this conclusion:

(1) The relevant market, on this basis, would have been the market for display advertising only. It is, on this basis, very difficult to understand the relevance of the other two markets defined in Chapter 5.

(2) If Paid Alignment advertising is display advertising then, given that Meta has significant market power in this market, the impairment to static competition is obvious. But that is a conclusion that only obtains if a finding is made that Paid Alignment is display advertising.

(3) It would be, we suggest, difficult rationally or properly to reach this conclusion as regards static competition without finding that Paid Alignment advertising falls within the market for display advertising.

66. These are, of course, precisely the points made by Meta in relation to Ground 2. But this is to overlook the fact that the Decision proceeds on the explicit basis that this is a case of dynamic competition.[77] As Decision/§5.4 states, an assessment of static competition is, in such circumstances, inappropriate. Dynamic competition involves a much more fluid competition between innovating firms,[78] and this may require more than one, connected, market to be considered, and so defined. Granted that no issue is taken as to how the three markets considered in the Decision (the supply of searchable GIF libraries, the supply of social media and the supply of display advertising) have been defined, the question is whether a consideration of three defined markets is, in and of itself, a failure to act lawfully in accordance with the standards of judicial review. We do not consider that it is:

(1) The Enterprise Act 2002 requires consideration of whether there has been a substantial lessening of competition "within any market or

[77] We have defined what this means in paragraphs 34 to 37 above.
[78] See paragraph 34 above.

markets in the United Kingdom" (our emphasis). The statute contains no impediment to the consideration of, and therefore the prior definition of, multiple markets.

(2) That is all that the Decision does in Chapter 5: namely, consider and define three markets, as we have described. It cannot be said that any one of these markets is not rationally to be taken into account, for they are clearly interconnected. Thus:

(i) The supply of social media – in which Meta has significant market power[79] – involves platforms with two markets running off them, between which there are network effects. Thus, a supplier of social media serves Social Media Consumers and sells display advertising (in which Meta also has significant market power[80]).

(ii) The supply of searchable GIF libraries – in which GIPHY is a GIF Provider – provides GIFs indirectly to Social Media Consumers via Social Media Providers, thereby enhancing the offering of those Social Media Providers. Usually, a GIF Consumer will at one and the same time be a Social Media Consumer.

(iii) The Paid Alignment Advertising offered by GIPHY sits uneasily in the advertising classification propounded in the Decision because it would often exist in conjunction with display advertising, but result from a search by a GIF Consumer/Social Media Consumer.

67. These interconnections or synergies or dynamics – call them what you will – are the stuff of dynamic competition. We stress that we are not, at this stage at least, making any kind of finding as to whether dynamic competition existed

[79] See paragraph 55 above.
[80] See paragraph 58 above.

nor – if it did – whether it was weakened or impaired. What we do find is that in defining the markets as it did, and in classifying, within those markets, Paid Alignment advertising in the manner that it did, the Group was acting rationally in order to put itself in a position properly to apply the substantial lessening of competition test in a case of dynamic competition. Since that is no more than the accepted role of market definition, it follows that Ground 2 must fail, and we dismiss it.

68. In doing so, we stress that we are saying nothing about the later stages of applying the substantial lessening of competition test. Furthermore, we would only make this statement as regards a finding of a substantial lessening of dynamic competition. Accepting that it is permissible to define and consider multiple markets renders the substantial lessening of competition test significantly less easy to apply, and so much more uncertain and unpredictable. Whilst defining markets in the context of an assessment of dynamic competition affords the competition authority an even greater margin of appreciation than would ordinarily be the case, it is incumbent upon the competition authority to be all the clearer in its analysis when considering the theory of harm and the counterfactual.

(6) The theory of harm in the case of the Horizontal SLC

69. The theory of harm that is tested in the Decision is that found by it.[81] In the Decision, the Group was considering whether the loss of GIPHY to Meta by way of the Merger resulted in a substantial lessening of (dynamic) competition in the display advertising market.[82]

[81] That is practically inevitable: the Decision found a substantial lessening of competition, ergo its theory of harm was found to exist.
[82] See, for example, Decision/Summary/§44.

(7) Ground 3: the counterfactual in the Decision

(a) Introduction

70. The essence of Ground 3 is that the counterfactual used by the CMA sits irrationally with the findings upon which it rests, such that it cannot stand. The starting point must be to examine precisely what counterfactual was used in the Decision, and the findings on which it purports to stand. Thereafter, we consider:

(1) Whether the nature of a counterfactual is different where what is being considered is a state of dynamic competition, as opposed to static or potential competition. This issue is similar to that which arose in the context of market definition.[83]

(2) The attack on the counterfactual as articulated in Ground 3.

(b) The counterfactual in the Decision and the CMA's findings

(i) Introduction

71. The counterfactual, in this case, is what would have happened had the Merger not taken place. The Decision makes two findings in relation to the counterfactual. The first concerns Meta's conduct and circumstances; the second concerns GIPHY's conduct and circumstances. Although Ground 3 principally concerns the latter, we deal with both below.

(ii) The counterfactual as regards Meta

72. The conclusion to Chapter 6 of the Decision states that in the absence of the Merger, Meta would have continued to procure GIFs from GIPHY.[84] The Decision notes that whilst Meta might have contemplated setting up its own GIF library, "this was a longer term proposition".[85]

---

[83] See paragraphs 41 and 65 to 68 above.
[84] Decision/§6.169. See also Decision/§6.25.
[85] Decision/§6.25.

(iii) The counterfactual as regards GIPHY

73. The relevant parts of the Decision say as follows:

> "6.167 In view of the above, we consider that at the time of the Merger, there were a number of options available to GIPHY which would have ensured its survival through the Coronavirus (COVID-19) pandemic, and would have allowed GIPHY to raise further capital to fund revenue growth, eg through expansion of its Paid Alignment offering.
>
> 6.168 Taking into account the evidence in the round, we consider that each of these options would have led to the same conditions of competition against which to assess the Merger, that is conditions of competition where GIPHY would have continued its efforts to supply GIFs, innovate, develop its products and services and generate revenues, doing so independently of [Meta]. This is therefore in our view the most likely counterfactual. We reach this view on the basis that:
>
> (a) a platform fee was an option that GIPHY and one or more of its API partners[86] would have considered absent the Merger as a solution to GIPHY's short term funding issues arising from the Coronavirus (COVID-19) pandemic, which would have provided GIPHY with access to capital in order to ensure its continued survival during the pandemic.
>
> (b) we do not consider that in the most likely scenario, all of GIPHY's investors would have 'taken the painful step of pulling the plug' on GIPHY in the absence of the Merger. Rather, we consider that obtaining funds from existing investors who supported GIPHY's Paid Alignment business model was an option available to GIPHY which would have maintained its ability to supply GIFs, innovate, develop its products and services, generate revenue and explore various options to further monetise its products. Furthermore, had GIPHY's investors required GIPHY to scale back its operations in the short-term, we do not believe that this would have been the case for a sustained period of time;
>
> (c) it is possible that external investors would have progressed their discussions with GIPHY in the absence of the Merger, although it is unclear whether external investors would have ultimately proceeded with an investment. However, a new external investor would only have been able to secure an investment in GIPHY at a valuation of more than USD100 million to USD150 million (in view of the other funding options available), and therefore, we consider that a new external investor providing funding on these terms would have, in principle, maintained the same basic incentives as GIPHY to continue to supply GIFs, innovate, develop its

[86] As stated earlier, GIPHY provides APIs to enable indirect provision of GIFs by it: see paragraph 45 above.

products and services, generate revenue and explore various options to further monetise its products; and

(d) while a sale to a third party, for example a social media platform, would have remained a possibility, it seems unlikely that GIPHY's shareholders would have accepted a sale of GIPHY at a valuation of between USD100 million to USD150 million, in view of the other funding options available. In fact, we consider that GIPHY's investors would only have considered a sale to an alternative purchaser at a valuation above USD150 million (especially noting that at [Meta's] proposed valuation of GIPHY of USD300 million, GIPHY's investors suggested to explore raising a further round of funding rather than selling GIPHY). Therefore, we consider that any such acquirer would have, in principle, maintained the same basic incentives as GIPHY to continue exploring ways to monetise its products."

74. The point is put pithily in the conclusion to Chapter 6 of the Decision:[87]

> "… GIPHY would have continued to supply GIFs, innovate, develop its products and services, generate revenue and explore (with the financial and commercial support of investors) various options to further monetise its products. This counterfactual would have prevailed regardless of GIPHY's ownership, i.e., whether under its pre-Merger ownership structure (receiving financial support and commercial expertise from investors) or if it had been sold to an alternative purchaser, possibly another social media platform."

(c) Nature of the counterfactual in cases of dynamic competition

75. In cases of static competition, because the analysis is of the present case, questions regarding theory of harm and the counterfactual are relatively straightforward to address. One needs to ask what would have happened had the merger or proposed merger not taken place. Thus, to revert to the static competition example we gave in paragraph 30 above, the matter in issue will be the extent to which competition would have been different in a market comprising three firms with a market share respectively of 60%, 25% and 15% (the counterfactual case) from the actual case of two firms: the merged entity with a market share of 75% and only a single rival with a market share of 25%.

76. Of course, this entails a high degree of hypothesis, both in understanding what would happen in the actual case (particularly where the merger is proposed or has only recently taken place) and in order to understand what would happen in

[87] Decision/§6.169.

the counterfactual case. But the parameters within which hypothesis is permitted and the limits of the exercise can be clearly discerned.

77. In cases of potential competition, the position is harder, because the assessment concerns both present and future elements. In our judgment, it is important both for clarity of analysis and for the defensibility of any decision made to keep judgments of these elements separate. Thus, to revert to the "potential competition" example we gave in paragraph 31 above, the analysis of the present state of that hypothetical market in the counterfactual case (here: 10 manufacturers, each with a 10% market share) and the analysis of the present state of the market in the actual case (here: 9 manufacturers, 8 with a 10% market share, and one with a 20% share) continues, in our judgment, to be extremely important. All cases are different but, in this case, we are assuming that the static competition position raises no concerns, and we consider that a competition authority should be frank in acknowledging this, if that is the case.

78. This then enables a clear grappling with the threat to potential competition. The question becomes: although there is no threat to static competition, because the two merger firms are each on a trajectory to expand their market share significantly in the future, there is an impairment to potential competition. It is a present threat of a future impairment. We consider that it is important, when assessing risks to competition in merger cases, that a clear distinction be drawn between what is (the static case) and what might be (the potential case). We also consider – although this is very much a matter of labelling, and so of secondary importance – that a consideration of the counterfactual case ought to be confined to an assessment of static competition, and that an assessment of threats to potential (and, indeed, dynamic) competition be very separately demarcated.

79. We say this, not because we wish to criticise either the CMA for the framing of its Decision, nor Meta for the framing of the NoA, but because clarity serves justiciability. More to the point, it seems to us, reading Chapter 6 of the Decision, which is concerned with the counterfactual case, that this is precisely the distinction that the Group has drawn and – if we may say so – rightly so. Chapter 6 contains no assessment, one way or the other, of threats to dynamic

competition. All Chapter 6 does – rightly – is to work out what the position as regards static competition would be.

80. It follows – and, again, this is not a criticism of Meta's NoA, but merely an attempt to articulate what is not a straightforward process – that Meta's framing of Ground 3 somewhat misses the point. Quoting from the NoA:[88]

> "90. The [CMA's] conclusion on the counterfactual includes that:
>
> *"… GIPHY would have continued to supply GIFs, innovate, develop its products and services, generate revenue and explore (with the financial and commercial support of investors) various options to further monetise its products. This counterfactual would have prevailed regardless of GIPHY's ownership, ie whether under its pre-Merger ownership structure (receiving financial support and commercial expertise from investors) or if it had been sold to an alternative purchaser, possibly another social media platform."*
>
> (the "Counterfactual")
>
> 91. This identification of the Counterfactual forms the basis for the Decision's later finding that it is likely that GIPHY would have expanded its Paid Alignment business internationally and specifically into the UK. That finding is an essential basis for the finding of a Horizontal SLC.
>
> 92. For the reasons set out below, the Counterfactual does not rationally follow from the [CMA's] findings of fact, is inadequately specified, and/or has been arrived at without the [CMA] having taken reasonable steps to acquaint itself with plainly relevant information or make necessary factual findings. In particular: …"

81. We end the quotation at the enumeration of Meta's view of the deficiencies in the Decision's reasoning not because they are irrelevant (they are not, and we will come to them) but because they go not to the counterfactual as we and the Group understand it, but to the assessment of a present threat of a future impairment (here: impairment of dynamic competition). Of course that assessment warrants very careful examination, but we do not consider that it is right for the very limited counterfactual finding of the CMA to be criticised simply because of those limits. It is very clear from the terms of the Decision that risks to potential or dynamic competition were considered by the Group not in Chapter 6, but in Chapter 7:[89]

---

[88] With emphasis added.
[89] Decision/§7.1.

> "In this Chapter [7], we assess whether the Merger has led, or may be expected to lead, to a loss of potential competition in display advertising in the UK. As discussed below, this is a theory of harm arising from horizontal unilateral effects."

(d) The attack on the counterfactual as found in Chapter 6 of the Decision

82. We have set out the CMA's conclusions in relation to the counterfactual in paragraphs 72 to 74 above. We consider that – viewing these conclusions, as we find them to be – as conclusions in relation to the static competition position, they are unassailable. That is because the conclusion is actually quite a limited one, namely that: absent the Merger, GIPHY would have continued in business much as before. It would not have gone bust (although that was, we think, a finding that was open to the Group). Nor would it have received a massive infusion of cash through investment so as to enable it dramatically to expand or change direction (and this, we think, is not a finding that the Group came anywhere near to making, and would not have been open to it, on the facts stated in the Decision). In short, subject to these constraints, GIPHY would have continued in its old business, keeping its head above water, seeking to continue to develop and expand its business; and Meta would have continued using GIPHY's services as it previously had done.

83. For these limited reasons, we dismiss Ground 3: but we should make clear that we do so on the basis that a number of the points there taken seem to us to be more appropriately considered in relation to Ground 1, to which we now turn.

(8) Ground 1: the finding of a Horizonal SLC is unjustifiable

(a) Introduction

84. There are two elements to Ground 1. The first is that the CMA improperly substituted a test of impairment of dynamic competition for the statutory test contained in the Enterprise Act 2002. The second is that, even if the CMA did not do so, its finding that there was a substantial lessening of competition by reason of impaired dynamic competition was "one which was not reasonably

open to it and/or was made without making reasonable prior inquiries or assessments that any reasonable regulator would have made".

85. We deal with these two, distinct, elements of Ground 1 in this order.

(b) Application of the wrong test

86. Where, as here, there is a finding that a relevant merger situation exists, the CMA must decide whether "the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services". We have already considered aspects of this test,[90] and in particular, we have found that substantial lessening of competition can arise through an impairment of dynamic competition. Of course, that impairment must amount to a substantial lessening of competition – the statutory test must be satisfied – but (as we have concluded) the statutory wording is clearly wide enough to include a substantial lessening of competition arising though an impairment of dynamic competition.[91]

87. Accordingly, we reject the contention that the CMA improperly substituted a test of impairment of dynamic competition for the statutory test contained in the Enterprise Act 2002. This is a mischaracterisation of what the CMA decided. At no point in the Decision did the Group misdirect itself as to the requirements that needed to be satisfied in order to conclude that the substantial lessening of competition test had been met. It is simply that the Decision concluded that the impairment to dynamic competition that it found to exist constituted a substantial lessening of competition.

88. It is, of course, an entirely separate question as to whether in this case the finding of a substantial lessening of competition by reason of impaired dynamic competition was justified. That is the second element of Ground 1, and it is to element that we now turn.

[90] See paragraph 24 above.
[91] See paragraphs 38 to 40 above.

(c) The finding of a substantial lessening of competition was unreasonable and should be set aside

(i) Introduction

89. As we have noted,[92] the notion of dynamic competition is, by its nature, not an easy one to nail down. It is, for that reason, all the more necessary (without being unduly prescriptive) to be clear as to the relevant factors that ought to be considered when making an assessment that dynamic competition has (or has not) been impaired. Equally, it is important to be clear about the manner in which this Tribunal should go about reviewing this sort of decision, it being common ground that the application be determined applying the principles of judicial review.

90. We consider the following points in the following order:

(1) First, we consider the nature of the review that we must undertake.

(2) Secondly, we set out what the Merger Assessment Guidelines and the Decision (in general terms) say about assessing or identifying dynamic competition and impairments to it.

(3) Thirdly, we seek to enumerate, in a non-exhaustive way, the points and factors that ought to be borne in mind when deciding whether there has been a substantial lessening of dynamic competition.

(4) Fourthly, we assess the decision that there has been a substantial lessening of dynamic competition by reference to these factors and this framework. We stress that although these points and factors have been framed after the Decision was published, they simply constitute a framework (drawn largely from the Merger Assessment Guidelines and the approach in the Decision itself) by way of which the lawfulness of the decision that there has been a substantial lessening of competition can be tested in a predictable way.

---

[92] See paragraph 34 above.

(5) Fifthly, and finally, we consider (in light of this assessment) whether the decision is, or is not, lawful.

(ii) The nature of the review

91. It was common ground between the parties that, in determining the grounds in the NoA, the Tribunal should apply the same principles as would be applied by a court on an application for judicial review.[93] This point is incontrovertible: it is laid down in statute, and we obviously accept it. It was also common ground between the parties that the question of whether a merger "may be expected to result" in a substantial lessening of competition was to be resolved by the CMA on the balance of probabilities.[94] In other words, the CMA was not obliged to make a finding one way or the other, but simply resolve the question on the basis of whether it was more likely than not. This proposition – albeit common ground between the parties – we do not accept, not least because we consider that to seek to review judicially not a finding of fact ("there was a substantial lessening of competition") but a conclusion as to whether a standard of proof was met ("on the balance of probabilities, there was a substantial lessening of competition") both sets the bar too low and is intellectually unworkable.

92. More specifically as to this point:

(1) As we have noted, there is an intrinsic oddity in reviewing on judicial review grounds a decision that there is, on the balance of probabilities, a substantial lessening of competition. What the Tribunal would have to do is test – on grounds of rationality or otherwise – not a decision that a substantial lessening of competition existed but rather a decision that, on the balance of probabilities, there was a substantial lessening of competition. Taking such an approach rigorously, not only requires difficult and unnecessary intellectual gymnastics, but also would give the CMA room for manoeuvre in making its decisions that would be difficult to defend. Accordingly, it is important to consider the basis upon which the parties advanced this proposition.

[93] See paragraph 11.
[94] See NoA/§22; Decision/Summary/§15.

(2) Closely examined, the common ground apparently subsisting between the parties as to standard of proof evaporates. Meta's position was that "[i]t is inherent in the words "*may be expected to result*" that the standard of proof is the balance of probabilities". That makes the words of the section – "the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services" – that we have underlined completely redundant. What, one might ask rhetorically, is the purpose of a higher standard of proof operating in parallel with a lower standard of proof? The authority cited by Meta in support of its argument does not support the proposition for which it is cited.[95]

(3) The Decision – in contrast to the NoA – does not rely on the words "may be expected to result" and instead stated:[96]

> "In deciding whether a Merger has resulted, or may be expected to result, in an SLC, the CMA must apply a 'balance of probabilities' standard. This means that the CMA must decide whether it is *more likely than not* that a Merger will result in an SLC."

We disagree. The CMA is a competition authority tasked with making decisions according to the best of its ability. The two decisions required in section 35 – the "questions to be decided" to use the title of the section – are binary "yes/no" issues:

---

[95] NoA/footnote 23 cites *Office of Fair Trading v. IBA Health Limited* [2004] EWCA Civ 142 at [81] (Carnwath LJ). At [81], Carnwath LJ stated:
"… The [Competition Appeal] Tribunal (without dissent) has interpreted "may be expected" as implying a "more than 50% chance" (para 182). Thus, in effect, the factual judgment has to be made on the balance of probabilities. …".
The Tribunal's interpretation in *IBA Health Limited v. The Office of Fair Trading* [2003] CAT 27 at [182] states:
"If we take the last element first, the words "may be expected to result" occur in both section 33(1)(b) and section 36(1)(b). Those words, in our view, reflect the fact that in a merger case one is looking at the future effects of a merger, as to which there can never be absolute certainty. In order to prohibit a merger, what is required by the statute is something less than a certainty, namely an "expectation". An expectation is, however, more than a possibility … A "more than 50% chance" may be a crude way of expressing the idea of "an expectation"."
What the Tribunal and Carnwath LJ were defining was not the standard of proof according to which the decision of the (now) CMA has to be made, but what "an expectation" is. We entirely accept that "an expectation" should be defined in this way, but that says nothing about the standard of proof.
[96] Decision/Summary/§15.

(i) Either there is a relevant merger situation or there is not. This question does not arise in the present application, but was something decided in the Decision; and

(ii) Either a substantial lessening of competition has resulted or it has not; *or* there is an expectation (i.e. a more than 50% chance) that a substantial lessening of competition may be expected to result or not.

These are the decisions that must be made by the CMA, and the Tribunal reviews their lawfulness in those terms, not on the basis of whether they are decisions that the CMA could have lawfully reached on the balance of probabilities.

(iii) The Merger Assessment Guidelines and the Decision on dynamic competition

The Merger Assessment Guidelines

93. It is appropriate to begin with the Merger Assessment Guidelines, to which the Decision makes reference. Chapter 5 of the Merger Assessment Guidelines deals with "Potential and dynamic competition". Potential competition is defined as:

> "… competitive interactions involving at least one firm that has the potential to enter or expand in competition with other firms. Potential competition is relevant to the potential for a merger to substantially lessen competition where, absent the merger, entry or expansion by either or both merger firms may have resulted in new or increased competition between them".[97]

We consider that this definition is broadly consistent with that we advanced in paragraph 31 above.

94. As regards dynamic competition, the Merger Assessment Guidelines say this:[98]

> "… existing firms and potential competitors can interact in an ongoing dynamic competitive process, and a merger could lead to a loss of dynamic

[97] Merger Assessment Guidelines/§5.1.
[98] Merger Assessment Guidelines/§5.3.

competition. Firms that are making efforts or investments that may eventually lead to their entry or expansion will do so based on the opportunity to win new sales and profits, which may in part be 'stolen' from the other merger firm. Incumbent firms that are making efforts to improve their own competitive offering may do so to mitigate the risk of losing future profits to potential entrants. In this sense, potential entrants can be thought of as dynamic competitors, even before they effectively enter and begin supplying customers. A merger may reduce the incentives of dynamic competitors to continue with efforts to enter or expand, or the incentive of incumbent firms to mitigate the threat of future rival entry or expansion. The impact of such a reduction in efforts would affect customers in the present, rather than solely from the future point in time when entry or expansion has occurred."

95. Again, we consider this formulation to be broadly consistent with what we have advanced in paragraph 34 above. However – and we entirely accept that the same is true of the formulation so far attempted in this Judgment – this does very little to create certainty and remove dynamic competition and impairments to it from the realm of "it is what I say it is".[99]

96. We were invited by the CMA to read and consider with particular care the following paragraphs in the Merger Assessment Guidelines:

"**Loss of dynamic competition**

5.17 In some sectors, an important aspect of how firms compete involves efforts or investments aimed at protecting or expanding their profits in the future. This includes efforts that may give firms the ability to compete in entirely new areas (ie to enter), or the ability to compete more effectively in areas where they are already active (ie to expand). Examples of the types of efforts or investments firms might make include developing new products or improving existing ones; introducing more efficient or disruptive business models; introducing new features that benefit customers but also increase customer stickiness; or sacrificing short-run margins (or even operating at a loss) in order to attract users to their platform and benefit from network efficiencies, to achieve a minimum efficient scale, to scale up a distribution network, or to establish a reputation.

5.18 Where investment and innovation efforts represent an important part of the competitive process itself, this can lead to dynamic competitive interactions between existing competitors and potential entrants that are making efforts to enter or expand (ie, dynamic competitors). Existing firms may invest in the present in order to protect future sales from dynamic competitors. Dynamic competitors making investments in the present will do so in order to win new sales in the future, including by winning sales from other suppliers.

[99] See footnote 26 and paragraph 37(3) above.

5.19 Mergers can reduce the dynamic competitive interactions between an existing supplier and a dynamic competitor, or between two dynamic competitors:

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

(b) A merger involving a dynamic competitor making efforts towards entry or expansion may lead the merged entity to reduce those efforts. After a merger, any profits that the dynamic competitor would expect to 'steal' from the other merger firm would no longer contribute to an incentive to enter, as these profits would already be captured by the merged entity.

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

5.21 Accordingly, while the CMA's assessment of dynamic competition may, in some cases, focus on entry and expansion in relation to specific products, in others, it may consider a broader pattern of dynamic competition in which the specific overlaps may not be identified easily at the point in time of the CMA's assessment. Examples might include two digital platforms exhibiting a pattern of using their existing platforms or suites of integrated services as a launchpad to enter into new, overlapping services; two pharmaceutical companies engaging in research programmes that are likely to treat the same illnesses; or two firms with geographic expansion strategies that are likely to target similar local areas. Where this is the case, the CMA may assess a broader loss of competition arising from a reduction in the merger firms' incentives to continue investing in these competing programmes or strategies, rather than focusing on individual future overlaps.

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

5.23 The likelihood of successful entry by a dynamic competitor and the expected closeness of competition between a dynamic competitor and other firms are both relevant to the constraint exerted by a dynamic competitor on other firms and the CMA will take this into account. The elimination of a dynamic competitor that is making efforts towards entry or expansion may lead to an SLC even where entry by that entrant is unlikely and may ultimately be unsuccessful. This may be the case

> if, for example, there is evidence that the competitor's entry or expansion would have a significant impact on other firms' future profits. In such circumstances, the removal of the threat of entry may lead to a significant reduction in innovation or efforts by other firms to protect those future profits.
>
> 5.24 Firms may use different levers to respond to dynamic competition. For example, firms may be more likely to flex their prices (which may be changed rapidly in the short-run) in response to competition from existing competitors, while using investment and innovation efforts to protect their profits from long-run, dynamic threats from potential entrants. Therefore, competition concerns may arise in relation to losses of existing competition despite the presence of dynamic constraints from potential entrants. Conversely, a loss of dynamic competition may be significant even though there are sufficient constraints to protect existing competition on aspects of competition that can be flexed in the short run."

97. We will consider what can be drawn from this guidance below. Before that, we turn to the Decision.

The Decision

98. Chapter 7 of the Decision concludes:[100]

> "On the basis of the above assessment, our view is that the Merger will lead to a **substantial lessening of competition in the supply of display advertising services in the UK arising from a loss of dynamic competition**. The effects on dynamic competition in display advertising arising from the elimination of GIPHY as a potential competitor are exacerbated by the weakening of competition between social media platforms as set out in Chapter 8, Vertical Effects."

99. In Decision/§§7.7*ff*, a "framework for analysis" is set out. We draw the following points from this:

(1) The static competition position must be the starting point for any analysis. That, as it seems to us, is the inevitable conclusion given how Chapter 6 of the Decision is framed.[101] Furthermore, it is a finding of the Decision – read properly – that there is in this case no substantial lessening of static competition.

[100] Decision/§7.255. Emphasis in the original.
[101] See paragraphs 72 to 79 above.

(2) The question is whether impairments to potential and/or dynamic competition (whether together or in combination) bring about a substantial lessening of competition. The Decision recognises that there is a connection between potential and dynamic competition:

> "7.9 Mergers involving a potential entrant can lessen competition in different ways. First, a merger involving a potential entrant may imply a loss of the future competition between the merger firms after the potential entrant would have entered or expanded. Second, existing firms and potential competitors can interact in an ongoing dynamic competitive process, and a merger could lead to a loss of dynamic competition.
>
> 7.10 Losses of future competition and losses of dynamic competition are interrelated, as they both involve the constraint from potential entrants, and both depend on the likelihood of entry or expansion by a potential entrant, and the impact of such entry or expansion on competition."

We agree with this. There is considerable danger in treating static, potential and dynamic competition as separate and distinct phenomena, when they are, in fact, closely related. As we said earlier (in paragraph 30 above), these forms of competition subsist on a spectrum, and cannot (and should not) be too rigidly demarcated.

(3) Decision/§7.12 then seeks to articulate the relevant factors to an assessment of an impairment of competition where there is no substantial lessening of static competition:

> "The importance of GIPHY as a potential competitor in display advertising, and hence its importance to dynamic competition, depends on a range of factors, including the efforts it would have made to expand in the display advertising market, the value of its efforts to innovate, the likelihood of expansion of its monetisation activities, the extent to which GIPHY may have stimulated innovation and competition by third parties (such as its API partners), the extent to which it may have been a competitive threat to [Meta], and [Meta's] incentives to respond to this threat. While the competitive process of innovation and the development of products by global players such as GIPHY and [Meta] takes place at a global level (such that developments will also be reflected in the UK), sales to customers occur at a national level. When assessing the effect of the Merger on the UK display advertising market it is therefore also necessary to consider the likelihood of GIPHY's entry into the UK and its efforts to achieve that goal."

(4) As is recorded in the Decision,[102] and as appears in Ground 1 of the NoA, Meta attacked this framework of analysis on the basis that it failed to reach the required standard of proof for a finding of a substantial lessening of competition. We do not agree – for the reasons that we have given – that this is inevitably the case. However, we do accept, given that there is no established framework for assessing an impairment to dynamic competition, that it is important to set out, in the abstract but with reasonable certainty, the relevant factors that need to be considered. This is so that the facts, as they are understood, can be grouped in relation to these factors, and a decision as to whether there is or is not a substantial lessening of dynamic competition can be made by the competition authority and, thereafter (if challenged), its lawfulness can be reviewed by the Tribunal.

(5) The Decision does not, in the abstract, set out the factors it took into account in reaching its decision on substantial lessening of competition. That is entirely understandable, given the purpose of the Decision and the CMA's function. However, it is helpful, when judicially reviewing a slippery concept like an impairment to dynamic competition, to at least enumerate, on a non-exhaustive basis, the relevant factors that the decision-maker ought to have had in mind, so that the lawfulness of the decision can properly be tested.

(iv) Relevant factors and approach when determining whether there has been an impairment of dynamic competition

Static competition in relevant markets is the starting point

100. Dynamic competition cannot and should not be considered in isolation from static or potential competition. Both potential and dynamic competition are informed by what is – by the state of static competition. The starting point should, therefore, generally be the state of static competition in any given market or markets.

[102] Decision/§§7.18*ff*.

101. These days, with the rise of digital platforms and the related increase in the importance of "multi-sided" platforms serving multiple markets, even the analysis of static competition may involve consideration of (and so definition of) more than one market.[103] That is all the more likely where dynamic competition is under consideration, because (as we have described[104]) dynamic competition involves much more fluid competition, with the potential for disruptions and incursions from participants in different markets.

102. An assessment of dynamic competition will therefore have to begin by identifying all relevant markets – bearing in mind the potential for dynamic interplay between markets – and then assessing the static competition in each.

Potential competition

103. We next consider that the prospect of potential competition should be considered. In other words, the likely future state of the relevant markets – and in particular the position of the entities that are merging – needs to be considered. Whilst we appreciate that the borderline between potential and dynamic competition is impossible to draw clearly, and whilst we would discourage approaches that seek to treat these different forms of competition as too distinct, the fact is that potential competition essentially involves an extrapolation of existing trends, whereas dynamic competition involves an assessment in relation to something that is inherently unpredictable. It makes sense, therefore, in any assessment, to consider those trends that can more reliably be determined (potential competition), before moving on to that which is likely to be more speculative (dynamic competition).

Time frame

104. It is necessary for there to be a clear understanding as to the time frame within which the impairment to dynamic competition would manifest itself. Although we appreciate that dynamic competition can (and probably will) exist in the

[103] It is unnecessary, for the purposes of this Judgment, to consider the analytical difficulties that "two-sided markets", as they are often known, give rise to.
[104] See paragraph 34 above.

present, it will not – by definition – have actually manifested itself.[105] Accordingly, the assessment of a substantial lessening of competition will have to consider:

(1) What would happen if the merger in question were to go ahead.

(2) What would happen if the merger in question were not to go ahead.

105. Assessment of impairment to dynamic competition will almost always involve consideration of expectations (i.e. an outcome with a more than 50% chance). Clearly, that outcome will involve consideration of multiple factors, but we doubt very much (although of course every case must turn on its facts) if an impairment to dynamic competition that is not thought to manifest itself within five years at the outside can be considered to be an expectation. The world is simply not that predictable.

Assessment of the merging parties

106. Having established the terrain of the inquiry, the nature of the merging parties needs to be considered. It will be necessary – just as the relevant markets have been considered, in both static and potential terms – to assess the market position of both the merging parties in both static and potential terms. No doubt this will be informed by the market identification, definition and assessment described in paragraphs 100 to 105 above, but we consider that it is important to keep well in mind the particular positions of each merging party.

Identification of the dynamic element

107. Given the fluid nature of dynamic competition, we anticipate that identification of the dynamic element will be very difficult. After all, dynamic competition is something that is propelled by the introduction of new products and new processes,[106] and so is by definition unpredictable. Nevertheless, in order to find an impairment to dynamic competition, the broad nature of the dynamic must

[105] See paragraph 37(1) above.
[106] See the quotation at paragraph 36 above.

be set out in order for a decision that dynamic competition is impaired to be defensible.

Duds?

108. Having identified the nature of the dynamic competition, it is necessary to test whether that dynamic is likely to actually manifest itself. We anticipate that the number of identifiable dynamic elements that actually succeed will be vastly outnumbered by the failures. And, emphasising the fact-specific nature of every case, it is likely that many, or even most, failures will not have any effect – one way or the other – on competition. Intervention (by preventing the merger) in such cases is not permissible, as there will be no expectation that a substantial lessening of competition will result.

109. Seeking to ascertain the likelihood that an identified dynamic will manifest itself will, we anticipate, also be very difficult. We set out, in the following sub-paragraphs, a number of factors that may assist in differentiating the dud from the genuinely dynamic. The list, we stress, is indicative and non-exhaustive:

(1) *The motives and thinking of the merging firms.* The motives and thinking of the firms will clearly inform as to the nature of the dynamic market. Take, as here, a merger between a relatively small – and struggling – firm (*Firm A*) and a behemoth with significant market power (*Firm B*). If *Firm B* is acquiring *Firm A* in order to kill off a rival, that is an indicator that a dynamic market is being impaired or suppressed. Equally, if *Firm A*, because it is struggling, is looking for financial backing so as to take forward a novel business development, that is an indicator that the merger may in fact be pro-competitive, not impairing dynamic competition, but facilitating it.

(2) *The market value attached to the dynamic element.* The market's own evaluation of the value of the dynamic element will be relevant. If, for instance, there is huge interest in *Firm A*, because of its plans, from not just *Firm A* but others, that is an indicator of a valuable dynamic

potential, and that perhaps it should not be permitted to strengthen or augment the market power of *Firm B*.

(3) *Contestability.* A contestable market is a market that has very low barriers to entry and exit. In a perfectly contestable market (which no market is), entry and exit are costless. Where a market is not contestable, there are barriers to entry (and, less relevantly for present purposes, exit). Where *Firm A* has successfully navigated these barriers, and established itself in the market, that is in and of itself a valuable property which should not – without consideration – be suppressed through merger. On the other hand, if a market is easily contestable, the significance of *Firm A*'s position is less, because it can be replicated without much effort.

(4) *Monetisation.* At the end of the day, the significance of a dynamic element turns on the manner in which it can be monetised. If that potential exists, and is great, then the significance of the dynamic element is high. If, on the other hand, the dynamic element – whilst a "good idea" – is no more than that, then the acquisition of *Firm A* by *Firm B* is less likely to signify in terms of impairment to dynamic competition.

Cross-check

110. Finally, given the fluid nature of dynamic competition and impairments to it, we consider that – where there is a conclusion that a merger gives rise to an expectation of a substantial lessening of dynamic competition, a cross-check should be carried out, where the competitive disbenefits of preventing or unwinding the merger are considered. Competition authorities like the CMA face an unenviable predicament of being damned if they act and damned if they do not act. Unwise intervention can just as easily lessen competition as an unwise failure to intervene.

(v) Assessment of the Decision by reference to the framework

111. We turn, then, to consider the Decision in light of the framework we have articulated.

Static competition in the relevant markets

112. In paragraphs 42 to 56 and 58 above, we noted that the Decision identified three relevant services – the supply of searchable GIF libraries, the supply of social media and the supply of display advertising – and defined them. That was the substance of Chapter 5 of the Decision.

113. The Decision also considers the position of Paid Alignment advertising, and we noted that the Decision does not pigeon-hole Paid Alignment advertising within any one of these markets. We concluded[107] that in defining the markets as it did, and in classifying, within those markets, Paid Alignment advertising in the manner that it did, the Group was acting rationally in order to put itself in a position properly to apply the substantial lessening of competition test. It is appropriate that we use the Group's findings as the starting point for the assessment of the relevant markets, and the static competition in those markets.

114. As to this, the Decision clearly sets out an awareness of the links between the three markets it defined. However, the Decision did not find the Merger to constitute any threat to static competition in any of the markets it considered, even though in two of those markets it found that Meta had significant market power. That is unsurprising, given the conclusion that Paid Alignment advertising was not display advertising.

Potential competition

115. The counterfactual used in the Decision was considered in Section B(7)(b) above. In this regard, we rejected the attack on the counterfactual arising out of Ground 3. We concluded that the CMA's counterfactual assessment in Chapter

[107] See paragraph 67 above.

6 of the Decision rightly confined itself to the static case, and was unimpeachable in judicial review terms.[108]

116. To recap:

(1) The Decision concluded that, in the absence of the Merger, Meta would have continued to procure GIFs from GIPHY. Whilst Meta might have contemplated setting up its own GIF library, this was a longer term proposition.[109]

(2) The Decision concluded that, one way or the other, GIPHY would have continued to supply GIFs, innovate, develop its products and services, generate revenue and explore (with the financial and commercial support of investors) various options to further monetise its products.[110] We stress that we consider that the Decision in no way concluded that GIPHY's position was a strong one: subject to that limitation, GIPHY would have continued in its old business, keeping its head above water and seeking to continue to develop and expand that business; and Meta would have continued using GIPHY's services as it previously had done.[111]

117. These findings not only inform as to the state of static competition, but also potential competition. We do not understand the Decision to make any finding that the Merger would cause an impairment to potential competition. There are no findings to support any such conclusion.[112]

Time frame

118. As we have noted,[113] the two relevant questions – *(i)* what would happen if the Merger were to go ahead and *(ii)* what would happen if the Merger were not to

[108] See paragraph 82 above.
[109] See paragraph 72 above.
[110] See paragraphs 73 and 74 above.
[111] See paragraph 82 above.
[112] The Decision does, of course, refer to potential competition, and that is unsurprising. But the focus is on impairment of dynamic competition.
[113] See paragraphs 104 and 105 above.

go ahead – both need to be considered within a relatively short space of time, otherwise there is unlikely to be an expectation of a substantial lessening of competition. The Decision does not state, in terms, the time frame over which it was assessing an impairment to dynamic competition. However, it is clear that the Decision was considering a time span of around two to three years[114] from the Merger date, which was May 2020.[115, 116]

Assessment of the merging parties

119. The Decision's assessment of how the merging parties stood at the time of the Merger is stated in paragraphs 55, 58 and 62 above.

Identification of the dynamic element

120. The Decision considers the importance of GIPHY as an innovator in Decision/§§7.33*ff*:

(1) GIPHY's development since its launch in 2013 is described as follows:[117]

> "Since its launch in 2013, GIPHY has been a pioneer in establishing GIFs as a popular feature of messaging apps. … [I]t has become a leading provider in these services, which are a tool for driving user engagement on social media platforms. GIPHY has developed a powerful GIF search algorithm, assembled a high-calibre creative team, and achieved wide distribution of its API/SDK services across third-party platforms. From the start of 2018, the introduction of GIF stickers, which are particularly popular on Stories features, contributed to its ongoing strong growth in traffic."

(2) Paid Alignment advertising was described as a "key innovation":[118]

---

[114] At times, the Decision looks to events further in the future, but the essential time span is as we have stated.
[115] Of course, the fact that the Decision is dated 30 November 2021 and this application was heard in April 2022 does not assist in answering either of these hypothetical questions, because the Merger itself and the enforcement orders made by the CMA have rendered neither of these cases the actual case.
[116] See Decision/§§7.54 (referring to an expected inventory growth in 2023); 7.65 (referring to shortcomings being addressed by GIPHY shortly after 2020); 7.76 (GIPHY's revenue targets growing strongly over the next five years, from March 2020); 7.86(d) (GIPHY's revenue projection for 2023); 7.89 (five-year O&O revenue forecast from March 2020); 7.169*ff* (short-term entry into the UK market); 7.204*ff* (Meta's assessment of GIF monetisation within 3-4 years); 7.218 (developments by Meta in monetisation in 2021).
[117] Decision/§7.33.
[118] Decision/§7.35.

> "One of GIPHY's key innovations was a novel form of digital advertising through its 'Paid Alignment' service. GIPHY launched its Paid Alignment service to advertisers in 2017. The service allowed advertisers to ensure the prominence of GIFs which promoted their brands on GIPHY's services. For example, branded GIFs could include product placement within the GIF, celebrity endorsement, and/or the inclusion of a brand logo on the GIF. These GIFs could be 'aligned' with specific search terms, so that when a user searched for that term, the branded GIF would be first or prominent among the search results. Paid Alignment also allowed advertisers to insert their GIFs into GIPHY's 'trending feed' on its O&O sites."

(3) Paid Alignment Advertising was initially only available on GIPHY's own sites, but in 2018, GIPHY extended the service to its API partners.[119] It is important to note that whereas GIPHY could unilaterally offer Paid Alignment advertising in cases of direct access through its own website or App, in cases of indirect access this would be subject to agreement with the relevant API partner, who might *(a)* consider that Paid Alignment advertising was not desirable or *(b)* only permit it on the basis of a revenue share arrangement.[120]

121. The GIF library provided by GIPHY served as an important enhancement to social media services provided by – amongst others – Meta. Users liked to enhance their messages or social media communication through the use of GIFs. To this extent, there is an essential complementarity between social media services and the provision of GIF libraries. Of course, GIPHY could offer GIFs directly, but this would lack the complementarity we have just described.[121]

122. However, there was also an intrinsic rivalry, in that Paid Alignment advertising would serve as a competitor to display advertising. It is here that the essentially unknown nature and potential of Paid Alignment advertising manifests itself. The difficulties in assessing the potential of GIPHY and its Paid Alignment advertising model are clear from the following paragraphs in the Decision:

> "7.51 The Parties submitted that GIPHY's Paid Alignment model faced unresolved, existential impediments. In particular, the Parties submitted that:

[119] Decision/§7.37.
[120] Decision/§7.37.
[121] See, for example, Decision/§§4.3, 4.8 to 4.11, 4.32 to 4.33, 4.41 to 4.43 (including Figures 9 and 10), 5.32 to 5.33, 5.79*ff*, 5.97 to 5.98.

(a) Because GIPHY lacked a meaningful user base of its own, it could not provide advertisers with the ability to monitor and track return on investment closely, offer 'direct response' ads (eg where the user clicks the ad in order to buy a product), or control third-party app environments where the ads would be seen.

(b) Advertiser demand for Paid Alignment was unproven, and to date had been limited to experimental ad budgets.

(c) GIPHY was dependent on entering into revenue-sharing agreements with larger API partners, and had struggled to sign such agreements.

(d) GIPHY's O&O traffic has stagnated, and even on its O&O products, GIPHY did not collect data about its users which would allow targeting of advertisements.

(e) GIPHY's sales team was inexperienced, and it had no-one to lead its revenue efforts at the start of 2020.

(f) Brand partners (ie brands who worked with GIPHY to promote their brands via GIFs, including Paid Alignment customers) had little appetite to explore international opportunities, and there was no realistic prospect that GIPHY could have expanded its Paid Alignments business into other markets or geographies outside of the US.

7.52 In response to our Provisional Findings, GIPHY told us that it 'has no meaningful ad inventory to sell and legal, technical, practical and regulatory challenges prevent it from monetizing GIFs ads'. GIPHY characterised these issues as 'insurmountable obstacles [which] prevented GIPHY developing a sustainable ad business'. …

7.53 For the reasons set out below, we consider that while GIPHY's model was still developing, and faced challenges and uncertainty, none of these amounted to 'existential impediments' or 'insurmountable obstacles' as suggested by the Parties. Indeed, it was attracting interest from large international advertisers and continued to have the support of its investors to develop its Paid Alignment offering. In addition, as we discuss below, we consider that the available contemporary evidence does not support GIPHY's submissions on the significance of its use of Non-Permissioned Inventory, or the significance of ad disclosure requirements. Rather, we consider that GIPHY was particularly well-placed to address the challenge of bringing this new business model to market at scale, and that it was making concerted efforts to achieve this, with the support of its investors."

123. These paragraphs set out very clearly the intrinsic difficulties in assessing dynamic competition. Of course, the seeds for the dynamism are present, but they have not grown to maturity – if they had, the dynamic competition would have become static competition. We therefore do not consider that there is anything surprising in these points, and do not consider that in and of themselves

they prevent there being an expectation of a significant impairment to dynamic competition. However, the finding of an expectation of substantial lessening of dynamic competition must be rationally founded and we now proceed to consider whether the CMA's conclusion in this regard was reasonable and lawfully founded.

Dud or no dud?

124. We outlined the various factors that the CMA should bear in mind in paragraph 109 above. We consider them below (although not in the same order):

(1) *The motives and thinking of GIPHY: development of GIPHY's business.* The CMA's assessment of GIPHY's position in the market at the time of the Merger has already been described.[122] GIPHY was not in a strong position, and its value (as perceived by GIPHY's own investors) was declining, not increasing.[123] That said, GIPHY had done a great deal of the hard work to establish its Paid Alignment advertising. The Decision records:[124]

> "… one of the greatest challenges facing innovative, digital companies is building a sizeable user base for its products and services, which can be monetised subsequently, often through advertising. GIPHY had already built a very large user base by the time of the acquisition by [Meta] and anticipated continued strong growth in users and search volumes. The potential future growth of Paid Alignment depends both on how effectively users can be monetised, and also on the future growth of GIF traffic. GIPHY's monthly global searches rose from 12.8 billion at the start of 2018 to 49.6 billion as of Q2 2020. In September 2019, GIPHY's forecasts estimated that its 'Global potential inventory (impressions)' would grow from 253 billion in 2018 to 2.35 trillion in 2023 – a ninefold increase."

We consider that the CMA was justified in concluding that building out from this platform did not present insuperable difficulties, and indeed would be a natural progression for GIPHY. The CMA specifically considered whether GIPHY would, in the counterfactual, have expanded into the United Kingdom market, and it concluded that it would have

[122] See paragraph 62 above.
[123] Decision/§§6.33, 6.70 to 6.97. See also Decision/Appendix E/§§15, 32*ff* and 47*ff*.
[124] Decision/§7.54.

done so.[125] We consider the thinking of Meta – the other party to the Merger – separately below.

(2) *The market value attached to GIPHY's Paid Alignment advertising model: views of investors and third parties.* GIPHY's investors were, as the Decision records, sceptical as to whether GIPHY would succeed in making good its Paid Alignment advertising plans. The Decision sets out the scepticism of some of these investors, particularly in the COVID-19 environment. In short, the value of GIPHY appeared to be declining when considered in light of the value attributed to GIPHY in successive investment rounds.[126] Also, the value that Snap placed on GIPHY – US$142 million – evidences a diminishing and not an increasing perception of value in GIPHY.[127] The Decision concludes that "[a]s a new entrant into display advertising, with an innovative advertising model, GIPHY unsurprisingly faced risks and challenges. However, we consider that, prior to the Merger, GIPHY had the support of its investors to continue to develop and expand its Paid Alignment business."[128] As far as it goes, that is right: but it does need to be borne in mind, as the Decision makes reasonably clear, that the perception was that GIPHY's was a business declining in value.

(3) *Views of Meta.* Meta paid significantly more than the "market value" for GIPHY, and a critical question is why Meta was prepared to pay so much above the "going rate".[129] We do not consider that Meta was acquiring GIPHY to suppress competition. The Decision records that Meta's social media platforms were quite dependent on enabling users of social media to access GIFs via GIPHY's GIF library. Meta, entirely unsurprisingly, was concerned to ensure that this supply of GIFs was not

---

[125] See Decision/§§7.169*ff*.
[126] Decision/§7.143. See also Decision/Appendix E/§§48*ff*.
[127] Of course, the value Snap attributed to GIPHY will have been for a variety of reasons, not just its "market value". Snap will, rightly, have been considering GIPHY's value to Snap.
[128] Decision/§7.146.
[129] There is, inevitably, a difficulty in terms like "market rate" or "going rate". The fact is that establishing a "market rate" for a non-fungible property is difficult. It might be said that the price Meta was prepared to pay for GIPHY was the "market rate". That is a defensible proposition, but an unhelpful one here. The fact is that Meta was unquestionably paying a premium – when compared to the value attributed by investors and by Snap – and the question is why it was willing to do so.

interrupted. Given the effort that creating a GIF library that social media users want to use involves, it is not surprising that Meta would have been prepared to pay a premium to ensure a continuity of supply.[130] This is not consistent with an impairment of dynamic competition; and Meta also recognised the potential of Paid Alignment advertising.[131] In the first place, the Decision finds that there was competition between Paid Alignment advertising and Meta's display advertising.[132] Meta may not have acknowledged the competition, but accepted that Paid Alignment could be monetised, which is tantamount to the same thing.[133] The Decision records as follows:

> "7.203 On 1 April 2020, Nir Blumberger emailed Mark Zuckerberg, Sheryl Sandberg and David Wehner[134] to request approval of the acquisition, and commented *inter alia* that:
>
> '…while we are unlikely to monetise with an external third party, there is potential to monetise the creation-related impressions, which the team estimates would yield >$750M in annual revenue (on IG[135] alone) within 4-5 years from launch.'
>
> 7.204 This possibility is further discussed in a detailed 'Value Analysis' paper prepared by [Meta] ahead of the Merger as 'offering a new ad format within the GIF drawer, enabling the first creation-oriented monetization product. Such a product is estimated at $500-750M/year on IG alone, within 3-4 years. …"

The Decision concludes that the "possibility of substantial monetisation of GIFs formed part of the request for approval of the acquisition, and is the only benefit from the acquisition which is quantified in monetary terms in this request for approval".[136] The Decision notes that this monetisation was *(a)* based on the Paid Alignment model;[137] and *(b)* that

---

[130] Decision/§§2.29, 2.32, 2.34 to 2.49, 5.98, 5.127, 8.36 to 8.39, 8.60*ff*.
[131] Decision/§§7.73, 7.198 to 7.216.
[132] Decision/§7.195.
[133] The fact is that advertising spend is ultimately limited, and if more is spent on Paid Alignment advertising, less will be spent on other forms of advertising, most obviously on close substitutes. The Decision found that Paid Alignment advertising was a close substitute for the type of display advertising services that Meta offered: Decision/§5.182.
[134] All senior executives within Meta.
[135] This shorthand has been understood to refer to Instagram. See also Decision/§8.66.
[136] Decision/§7.209(a).
[137] Decision/§7.209(b): "[Meta's] assessment of the opportunity is based on a model that appears broadly similar to that which GIPHY had been seeking to develop prior to the acquisition".

Meta was thinking of using GIPHY's innovation to evolve its own novel forms of advertising.[138]

(4) *Contestability, monetisation and obstacles to business.* The Decision records considerable advertiser enthusiasm for Paid Alignment advertising,[139] and considered that GIPHY's expansion into the UK would or could have been very successful.[140] This is supported by the point – made above[141] – that GIPHY had built up a successful GIF library that was attractive to social media users, which was not easy to replicate from a standing start. Against this, there is the fact that GIPHY would undoubtedly have had less ready cash than it would have wanted to expand.[142] There is one other obstacle to business that needs specifically to be noted. We have already observed that indirect access to GIPHY's GIF library requires consent from the party providing that indirect access,[143] and that consent might *(a)* preclude Paid Alignment advertising or *(b)* require revenue sharing. Both of these outcomes act as constraints on GIPHY's business model, and it is quite clear that GIPHY's "inventory" (i.e. the GIFs it was permitted to display in response to a user search) was subject to restrictions where "sending promoted content is explicitly restricted ([Meta] …)".[144] Whilst this highlights the potential for competition between display advertising and Paid Alignment advertising, the fact is that such restrictions are at least *prima facie* lawful, and restrictive of GIPHY's business. One way in which GIPHY avoided such restrictions was quite simply to disregard them, i.e. act in breach of contract.[145] We do not consider that such unlawful activity (there is no point in mincing words: contracts are made to be observed) can permissibly be factored into an assessment of

---

[138] Decision/§§7.218*ff* describes recent developments in monetisation by Meta. There was, unsurprisingly, an argument about the extent to which these developments were actually an evolution of Paid Alignment advertising, but that misses the point. The fact is that Meta was looking to monetise GIFs by way of advertising – and GIPHY had the GIF library.
[139] Decision/§§7.75*ff*.
[140] Decision/§§7.169*ff*.
[141] See paragraph 124(3) above.
[142] See paragraph 124(2) above.
[143] See paragraph 120(3) above.
[144] Decision/§7.95(a).
[145] Decision/§§7.108.

dynamic competition. Dynamic competition must be dynamic lawful competition. The Decision, however, is very much alive to this point, reaching the following conclusion:[146]

> "In our view, GIPHY faced a challenge of ending its use of Non-Permissioned Inventory while growing its advertising business. However, it was making progress in addressing this challenge, and had scope to substantially grow advertising revenues on permissioned inventory. Therefore, notwithstanding this challenge, we remain of the view that GIPHY's efforts to monetise its service were valuable to dynamic competition."

(vi) Conclusion

125. We have found that the CMA correctly directed itself to the test it had to apply. The question is whether there is an expectation – a more than 50% chance – that a substantial lessening of competition will result, the impairment to competition in this case being an impairment to dynamic competition. We readily acknowledge that this type of assessment involves difficult questions of judgement, and that the burden of resolving these falls, principally on the competition authority tasked with doing so. This application is not an appeal on the merits, but a judicial review. It is our task not to consider whether the CMA has "got it right", but whether the decision it made was lawful or not.

126. In this regard, we have no hesitation in concluding that the decision made by the CMA was one that it was entitled to make. It is striking that the framework for analysing an impairment to competition set out in paragraphs 100 to 110 above is one which, although informed by the Merger Assessment Guidelines and the terms of the Decision (both of which we considered with care before the oral hearing began), is nevertheless one that we have independently sought to develop, as an analytical framework for testing the rationality and lawfulness of the decisions made by the Group. It is a testimony to the care and careful consideration of the Group, that the evidence and thinking set out in the Decision easily passes the framework we have sought to set out. We see no basis for setting aside the conclusion of the CMA regarding a substantial lessening of competition. The conclusion is a rational one, which was reasonably open to the

[146] Decision/§7.125.

CMA and which takes account of the material considerations and does not take account of immaterial considerations.

127. We accept that assessment of impairments of dynamic competition involve difficult questions of judgement. Given these difficulties, we consider that – for the future – where questions of dynamic competition arise, the CMA should undertake a "cross-check" in relation to its conclusions. It should ask itself (as it has done here) "What are the disbenefits of the Merger, given the statutory tests?", but also "What are the disbenefits of intervention". The fact is that competition authorities like the CMA are in an unenviable position when it comes to assessing the lawfulness of mergers. Intervention may well be necessary, and must occur, where the statutory tests are met. But, equally, intervening where it is unnecessary, where the statutory tests may not be met, can be as damaging. In this case, for instance:

(1) The outcome of the Decision is an interference in a merger situation that is largely taking place outside the jurisdiction. We are in no doubt that there is jurisdiction for the CMA to intervene in this case, but the demands of comity do require the CMA to be at least conscious of the international dimension. (Although we were not addressed on this in any detail, we understand that such considerations do pertain.[147])

(2) In some instances, disapproval of a merger may have a chilling effect on innovation more generally. Entrepreneurs like those who founded GIPHY will have at least half an eye on future acquisition by a behemoth like Meta, and this may inspire, rather than eliminate, innovation and enhance consumer benefit. In short, and as we have considered, acquisition by a larger undertaking may allow the smaller (acquired) undertaking to flourish and, on that basis, be considered as pro-competitive.

128. Accordingly, for the future, in cases of dynamic competition, we would find it easier to review decisions on a judicial review basis if the CMA were

[147] Decision/§§3.51 to 3.54.

consciously to ask itself: "What is the position if your assessment of the impairment to dynamic competition is wrong?"

129. We also consider that such an approach deals with the concerns about comity raised by one of the Interveners. We do not consider that these concerns were well-founded – the jurisdiction to intervene exists – but in international cases, regard needs to be had (even if it is not determinative or even immaterial) to the wider context.

C. THE PROCEDURAL CHALLENGES

(1) Introduction

130. As we have described, there are two grounds of procedural challenge – Ground 4 and Ground 4A. Ground 4 in fact has two elements. Thus, the grounds of procedural challenge (in the order that we will consider them) are actually as follows:

(1) Ground 4A: unlawful delegation.

(2) Ground 4, element two: unlawful excisions made by the CMA.

(3) Ground 4, element one: failure to disclose, in a timely fashion or at all, information relating to Snap or to make adequate inquiries of Snap.

(2) Ground 4A: unlawful delegation

(a) The CMA constitution

(i) The CMA Board

131. The CMA has a Board. It comprises the chair and certain appointed members.[148] Except where otherwise provided by or under any enactment, the functions of

[148] Schedule 4 to the Enterprise and Regulatory Reform Act 2013, paragraphs 1 and 27.

the CMA are exercisable by the "CMA Board" on behalf of the CMA.[149] There are defined powers of delegation, which provide:[150]

> "Anything that the CMA Board is required or permitted to do (including conferring authorisation under this sub-paragraph) may be done by –
>
> (a) a member of the CMA Board, or a member of staff of the CMA, who has been authorised for that purpose by the CMA Board, whether generally or specifically;
>
> (b) a committee or sub-committee of the CMA Board that has been so authorised."

132. Thus there are generous – but specifically conferred – powers of delegation on the CMA Board, and the provision that states that the CMA Board may regulate its own proceedings[151] clearly cannot be used to confer broader powers of delegation.[152]

(ii) The CMA panel, CMA groups and group chairs

133. The "CMA panel" is distinct from the CMA Board,[153] and with a very specific (statutorily laid down) composition.[154] Essentially, "[t]he CMA panel is a panel of persons available for selection as members of a group constituted in accordance with this Part of this Schedule".[155] Thus, a group (which is referred to in the legislation as a "CMA group") is a sub-set of the panel, and is constituted by the chair (of the CMA Board):[156]

> "Where the chair is, by or under any enactment, required to constitute a group under this Schedule (a "CMA group"), the chair must constitute the group in accordance with this Part of this Schedule."

134. The members of the CMA group are selected by the chair in accordance with the statutory requirements;[157] each CMA group is to consist of at least three

---

[149] Schedule 4 to the Enterprise and Regulatory Reform Act 2013, paragraph 28.
[150] Schedule 4 to the Enterprise and Regulatory Reform Act 2013, paragraph 29(1), but subject to the limitations in paragraphs 29(2), (3) and 30, which are not material for present purposes.
[151] Contained in Schedule 4 to of the Enterprise and Regulatory Reform Act 2013, paragraph 31.
[152] We agree with Mr Jowell, QC's submission in this regard, which the CMA did not dispute.
[153] Established by Schedule 4 to the Enterprise and Regulatory Reform Act 2013, paragraph 34.
[154] See Schedule 4 to the Enterprise and Regulatory Reform Act 2013, paragraph 35.
[155] Schedule 4 to the Enterprise and Regulatory Reform Act 2013, paragraph 34.
[156] Schedule 4 to the Enterprise and Regulatory Reform Act 2013, paragraph 36.
[157] Schedule 4 to the Enterprise and Regulatory Reform Act 2013, paragraph 37.

members;[158] and the chair will appoint one such member of the group as the group chair.[159]

135. In this case, as we have described, the CMA group comprised Mr McIntosh as Group Chair, and Mr Cohen, Ms Daly and Mr Rose.[160]

(iii) References to CMA groups

136. Section 22(1) of the Enterprise Act 2002 provides in relation to completed mergers:

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

137. The Group was constituted pursuant to this provision[161] and the Group, so constituted, made the Decision pursuant to section 35(1) of the Enterprise Act 2002.[162] Section 34C(1) of the Enterprise Act 2002 provides:

> "Where a reference is made to the chair of the CMA under section 22 or 33 for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013, the functions of the CMA under or by virtue of the following provisions of this Part in relation to the matter concerned are to be carried out on behalf of the CMA by the group so constituted –
>
> (a) sections 35 to 41B, except for sections 35(6) and (7), 36(5) and (6) and 37(6) …"

(b) Investigations and reports by the Group

138. Section 38 of the Enterprise Act 2002 provides:

---

[158] Schedule 4 to the Enterprise and Regulatory Reform Act 2013, paragraph 38(1).
[159] Schedule 4 to the Enterprise and Regulatory Reform Act 2013, paragraph 38(8).
[160] See paragraph 7 above.
[161] Decision/§1.1. The reference must specify the enactment under which it is made and the date on which it is made: section 22(4) of the Enterprise Act 2002.
[162] Decision/§1.1.

"(1) The CMA shall prepare and publish a report on a reference under section 22 or 33 within the period permitted by section 39.

(2) The report shall, in particular, contain –

(a) the decisions of the CMA on the questions which it is required to answer by virtue of section 35 or (as the case may be) 36;

(b) its reasons for its decisions; and

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

(3) The CMA shall carry out such investigations as it considers appropriate for the purposes of preparing a report under this section."

139. The CMA is obliged to publish any decision made by it pursuant to these provisions.[163]

(c) The underlying facts concerning the production of the Decision

140. Although Ground 4A concerns a relatively limited point regarding whether unlawful delegation of the Group's responsibilities occurred, it is appropriate to set out in one place (and this is that place) the process by way of which the Decision came to be produced:

(1) The work of the Group broadly speaking fell into three phases: *(a)* the investigation phase; *(b)* the decision-making phase resulting in circulation of Provisional Findings to interested persons; and *(c)* the final review phase, where the Provisional Findings were reviewed in light of responsive representations received so as to produce a final Decision.[164] The Group's conduct of the merger investigation is facilitated by the support of CMA staff, who are civil servants. However, the Provisional Findings and the final Decision "are based on the Group's own judgement, as reached after their in-depth analysis of the evidence gathered in the investigation and as set out in the respective reports."[165]

---

[163] See section 107(1)(a) of the Enterprise Act 2002.
[164] See McIntosh 1 generally, and in particular McIntosh 1/§§9 and 16.
[165] McIntosh 1/§9.

(2) At both the Provisional Findings and final Decision stages of the process, a document is published. Various versions are published:

(i) A public version, which "has all information that the CMA has confirmed is confidential to the parties and third parties redacted".[166]

(ii) A parties' version, which "discloses both of the Merger Parties' information (including confidential information), but the confidential information therein is highlighted according to which party it is confidential to. Third party confidential information is redacted."[167]

(iii) A CMA version, which is a "fully confidential 'master' version, which is highlighted to indicate which information is confidential to each party and to third parties. This version is normally not disclosed to the Merger Parties or the public."[168]

(3) As has been described, the CMA protects third party confidentiality. As to this:[169]

> "Prior to disclosing any information to which Part 9 of [the Enterprise Act 2002] applies, the CMA's practice is to conduct what is called a "*put-back*" exercise where extracts from the [Provisional Findings] or [Decision], which contain the evidence that the CMA intends to rely on, are put back to the party that provided that evidence in order to confirm both accuracy and whether the party wishes to make any confidentiality representations. The CMA will not necessarily accept generic or unsubstantiated confidentiality representations from parties on their face and will make its own decision on whether the information should be kept confidential. …"

(4) As we have described, Snap was interested in acquiring GIPHY for an amount of US$142 million according to an internal term sheet, but was not willing to bid against Meta's far higher offer for GIPHY. Snap in the end acquired Gfycat. This information (which we summarise: the detail

[166] McIntosh 1/§11.
[167] McIntosh 1/§12.
[168] McIntosh 1/§12.
[169] McIntosh 1/§21.

is for present purposes immaterial) was treated as confidential by the CMA, and we shall refer to it as the "Snap Information". The Snap Information was disclosed by the CMA in two tranches into the Ring, on 25 August 2021 and 6 December 2021. It should be noted that the CMA had the Snap Information well before these dates.[170]

(5) On 5 August 2021, the Group agreed the substance of the Provisional Findings in this case (as described in paragraph 8 above). It is at this stage appropriate to note how the Group operated in this case in compiling the Provisional Findings and ultimately the Decision:[171]

> "23. In this Investigation, specifically, individual chapters and appendices of the final [Decision], which were later combined to form the final version of the Decision, were drafted separately, with certain members of the case team responsible for drafting sections relevant to their area of expertise, in accordance with the Group's instructions. Much of the material in the [Provisional Findings] remained relevant to the Group's thinking in relation to the potential competition concerns identified in the course of the Investigation and therefore provided an appropriate base for drafting the Decision.
>
> 24. Instructions concerning the drafting of relevant sections of the Decision were given to the case team by the Group following the discussions with, and positions agreed by, the Group at Group meetings. To assist that process, the case team also presented further analysis on particular aspects of the Investigation and/or pursued certain lines of inquiry as directed by the Group. This process was iterative and reflected the Group's own thinking as it developed in light of the evidence and analysis. It also reflected the need to accurately capture the Group's views on both the substantive issues (e.g. whether there was an SLC) and the evidence relating to those issues.
>
> 25. Drafting the Decision so that it can be published by the statutory deadline is a substantial and time-pressured task that could not practically be undertaken solely by the Group members. The Group therefore required the support of the case team to progress the preparation of the Decision.
>
> 26. Whilst the core drafting of the Decision was done by the case team, the Group members directed and closely oversaw the drafting process and commented extensively on the draft text produced by the case team, particularly in respect of [the Provisional Findings] and the Decision. While Group members would typically refrain from suggesting stylistic changes which had no bearing on the substance – other than to enhance clarity – I and the other Group members saw it

[170] The precise date does not really matter, but it was around June 2020 for at least some of the Snap Information: McIntosh 1/§§34-35.
[171] McIntosh 2.

as our responsibility to ensure that the published documents (such as the [Provisional Findings] and Decision) accurately reflected the Group's views and the reasoning supporting those views.

27. This process was greatly facilitated by hosting electronic versions of the Decision documents on SharePoint. Using Microsoft Office 365, versions of the draft Decision documents were readily accessible to Group members. We could review changes, or indeed contribute to the documents, in real-time."

The minutes of the Group meeting held on 5 August 2021 at which the Provisional Findings were agreed record as follows:

"**Horizontal Effects – Discussion**

5. The Group discussed the draft horizontal effects chapter. The case team agreed to update this chapter considering the Group's discussion and circulate updated versions before the end of the week.

Discussion of other documents

6. The Group stated that it planned to provide any written comments on the outstanding documents by close of business today

7. The Group discussed some minor comments on the draft vertical effects chapter. The case team agreed to update this chapter considering the Group's discussion.

AOB

8. As the Group has agreed the substance of the Provisional Findings, it agreed to delegate final approval of all chapters and supporting material to the Chair, except for the Horizontal Effects chapter. This is subject to the case team reviewing any further written comments by Group members received by close of business today."

(6) The Provisional Findings were sent to the Merger parties – and specifically, to the external solicitors who were acting for Meta as well as for GIPHY – on 12 August 2021. This was in the form of a parties' version. In other words, it contained redactions for confidentiality, generally marked by the symbol "[✂]". As we understand it, the Provisional Findings redacted <u>all</u> third party confidential material, but contained information that was confidential to both Meta and GIPHY.[172]

[172] McIntosh 1/§§63, 65 and 68. See also NoA Annex 15.

(7) Subsequently, on 25 August 2021, various of these redactions were unredacted by material that was disclosed into the Ring. This material, therefore, was available for the external legal and economic advisers, but not Meta, to see.[173] Further disclosures were made on later dates in the same way.[174]

(8) A response to the Provisional Findings was provided by Meta in September 2021 and the Decision was considered and approved in a Group meeting on 16 November 2021.[175] Mr McIntosh said this about the final approval of the Decision:[176]

> "At the [Decision] stage, the consultation has concluded, and the [Decision] sets out the Group's final conclusions in relation to the statutory questions. Accordingly, the CMA's duty of consultation comes to an end. The CMA of course has a duty to publish its reasons, which it did in the [Decision] published on 30 November 2021. The Parties' Version of the [Decision] was provided to the Merger Parties' legal advisers on that same day."

(9) The NoA says this about the extent of the redactions (or "excisions" as Meta called them):[177]

> "The Decision in the present case, in the form it was provided to Meta, was heavily excised by the [CMA], such excisions being marked "*[✂]*". Some of the material excised was provided to Meta's external advisers on 6 December 2021. Even then, however, the Decision was in significant part still heavily redacted. Numerous parts of it were, as a result of the redactions, not capable of being understood by Meta and/or its external advisers or, therefore, capable of being addressed by them at the time of the Decision and the filing of the [NoA]."

(d) The rules regarding delegation by the Group

141. Meta adopted an extreme position on delegation, namely that it was essentially not permitted. On the other hand, Meta (at least at times: there were exchanges during argument where this line may not have been consistently held) accepted that the CMA's staff could assist in the investigatory process and even draft the decision. Yet that is a form of delegation – even if the work is approved

[173] McIntosh 1/§§72 to 83.
[174] These are described in McIntosh 1, but it is unnecessary to set out the detail.
[175] McIntosh 1/§115.
[176] McIntosh 1/§117.
[177] NoA/§116.

subsequently. We consider that an effect of a strict no-delegation rule would be that the Group would have to do everything apart from (perhaps) the most minor administrative tasks. For the reasons that we give below, we consider this point to be in substance misconceived. We consider that the reference to delegation in the minutes of the 5 August 2021 Group meeting[178] misstates the manner in which the Group was actually operating, and so misleads. As we explain below, we do not consider this to be a case of delegation (in the strict sense of powers being capable of formal devolution to and exercise by someone else without reference to the person on whom the power is conferred) at all. The question is actually whether the Group was personally responsible by virtue of the office they held to conduct the investigation, produce the Provisional Findings and then the Decision, and whether they were entitled to perform these functions through others in a manner not involving delegation. In *Carltona Ltd v. Commissioners of Works* ("*Carltona*"),[179] the Court of Appeal rejected a challenge made to a decision taken by a senior civil servant on the ground that the statutory power was conferred on the minister rather than his officials. Lord Greene MR said:[180]

> "In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them. To take the example of the present case no doubt there have been thousands of requisitions in this country by individual ministries. It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament. The whole system of departmental organisation and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them."

[178] Set out in paragraph 140(5) above.
[179] [1943] 2 All ER 560.
[180] At 563.

142. In *R (King) v. Secretary of State for Justice* ("*Re King*"),[181] Lord Reed explained the *Carltona* principle in the following terms:

> "The *Carltona* principle, as it has become known, is not one of agency as understood in private law. Nor is it strictly one of delegation, since a delegate would normally be understood as someone who exercises the powers delegated to him in his own name. Rather, the principle is that a decision made on behalf of a minister by one of his officials is constitutionally the decision of the minister himself. As Jenkins J stated in *Lewisham Metropolitan Borough Council v. Roberts* [1949] 2 KB 608, 629, when rejecting an argument that the principle was one of delegation:
>
> > "I think this contention is based on a misconception of the relationship between a minister and the officials in his department. A minister must perforce, from the necessity of the case, act through his departmental officials, and where as in the Defence Regulations now under consideration functions are expressed to be committed to a minister, those functions must, as a matter of necessary implication, be exercisable by the minister either personally or through his departmental officials; and acts done in exercise of those functions are equally acts of the minister whether they are done by him personally, or through his departmental officials, as in practice, except in matters of the very first importance, they almost invariably would be done. No question of agency or delegation … seems to me to arise at all.""

143. Of course, the *Carltona* principle does not apply to every office holder, and in *Re King* the Supreme Court held it did not apply to the holder of a statutory office like prison governors.[182] We accept that, in the case of a statutory body, like the CMA, the operation of the *Carltona* principle must be consistent with and/or arise out of the terms and true construction of the legislation setting up the statutory body in question.[183] We are in no doubt, however, that the *Carltona* principle applies to CMA groups in this case:

(1) Section 34C(1) of the Enterprise Act 2002[184] provides that certain functions of the CMA are carried out "on behalf of the CMA by the group so constituted". That means that whilst the CMA is ultimately responsible for the function so delegated, within the CMA the

---

[181] [2015] UKSC 54 at [49].
[182] [2015] UKSC 54 at [50].
[183] In subsequent written submissions, invited by the Tribunal after circulation of this Judgment in draft, Meta helpfully identified a great deal of case law asserting that a power to delegate, in a statutory case, must expressly or impliedly be found to exist: see, e.g., *Nelms v. Roe* [1970] 1 WLR 4 at 8; *Director of Public Prosecutions v. Haw* [2007] EWHC 1931 (Admin), [2008] 1 WLR 379 at [33]; *Noon v. Matthews* [2014] EWHC 4330 (Admin) at [21]. We accept this, but do not consider that the *Carltona* principle cannot apply where it is consistent with and/or arises out of the relevant legislation, which is our conclusion here.
[184] Set out in paragraph 137 above.

responsibility is that of the CMA group, not the CMA Board. Thus, in the case of a decision made under section 35(1) of the Enterprise Act 2002 (as this Decision is), the decision is that of the CMA (properly named as the Respondent to this application), but the decision-maker is the nominated CMA group, as per the procedure described above.

(2) This says nothing about the manner in which the group goes about its duties. Self-evidently, the CMA group is expected to discharge those responsibilities carefully and must not delegate them. But that does not mean that named individual members of the CMA group must personally conduct a merger investigation and personally draft the provisional findings and final decision. If that were the position, section 38 of the Enterprise Act 2002[185] would not refer to the "CMA" preparing and publishing a report or to the "decisions of the CMA", but to the personal report and decisions of the named individuals of the group.

(3) There is nothing surprising in this outcome. Merger investigations require significant resource and are conducted under significant time pressure. The logical consequence of Meta's argument is not only that ministerial functions (like sending the final decision to the parties and publishing it on the CMA's website) would have to be done personally, but also that the CMA group would be required to do the impossible, in personally investigating the circumstances of a merger, which is a job that could not possibly be done by a group of four individuals within the prescribed statutory time frame.[186]

(4) Naturally, the application of the *Carltona* principle implies a high degree of trust in the CMA group (and not, we stress, any single member of that group) in discharging its duties responsibly. We consider that such a level of trust is entirely appropriate in this case. Of course, the CMA is not, unlike a minister, accountable to Parliament. But it is accountable, by statute, to this Tribunal and the high level of trust accorded to the

[185] Set out in paragraph 138 above.
[186] See section 39 of the Enterprise Act 2002.

CMA's processes is not a blind trust. We should say that our embracing of the *Carltona* principle in the case of CMA groups is closely linked to our view of the redactions that the CMA can permissibly make, and the role of judicial review in ensuring that the CMA's decision-making process is not merely robust, but demonstrably so to the parties affected by the decision. There is thus a link between Ground 4A (which we dismiss) and Ground 4 (to which we will come).

Put another way, we conclude that the Enterprise Act 2002 contains a form of power in the CMA group to delegate, but that that power is attenuated in that it is the CMA group that is the decision-maker, and not some delegate. That is best and most appropriately captured by the formulation of Lord Greene MR in *Carltona*.

144. For these reasons, Ground 4A fails.

(3) Ground 4, element 2: unlawful excisions

(a) First principles

145. A great deal of the argument before us involved contentions regarding the significance or otherwise of the redactions made by the CMA to the Provisional Findings and to the Decision.

146. As regards the Provisional Findings, Meta, for its part, submitted that the redactions were highly material and impeded Meta's ability to respond effectively to the Provisional Findings when seeking to persuade the CMA to change its mind. The CMA, for its part, contended that these assertions were overblown; that the gist of the CMA's reasoning had been disclosed; and that Meta was in no way inhibited from responding effectively and had been able to make (and did make) all of the points it properly could.

147. As regards the Decision, the CMA defended the redactions or excisions that had been made by contending that although – by reason of section 38(2)(b)[187] – the CMA's Decision had to state the "reasons for its decisions" – the CMA's practice was to say more and explain more than it was strictly obliged to. In short, the full, unredacted, Decision contained a degree of overkill. For this reason, the CMA was prepared to stand by a redacted version of the Decision, and defend that version on this application, rather than the full, unredacted, confidential version of the Decision.[188]

148. We consider that these contentions, both in relation to the Provisional Findings and the Decisions, are misconceived:

(1) Where a competition authority is obliged to publish a decision with reasons, as is the case here, the decision-maker is not permitted to pick and choose which version of the decision it wishes to defend. The decision that is to be defended is the decision that contains all of the decision-maker's reasons, and the decision-maker is not permitted to contend that parts of its decision should left out of account.

(2) The addressees of a decision and any other persons affected by a decision are entitled to understand exactly the basis on which the decision is made, and the decision-maker must stand by and defend the decision it has made, and not some variant that leaves bits out. The CMA's overkill argument is no justification for the decision of the CMA being anything other than the full, unredacted, confidential version of the Decision. One person's overkill may be another person's material misdirection, and it is invidious for there to be any debate about what the decision, and the reasons for it, are. Suppose, hypothetically, a decision contains a redacted part, which discloses that the decision-maker has in fact taken into account an immaterial consideration. Any suggestion that only the redacted, incomplete decision should be reviewed is inimical to a fair process.

[187] Set out in paragraph 138 above.
[188] This is the CMA version, described at paragraph 140(2)(iii) above.

(3) We similarly consider that a decision-maker cannot, properly, excise from its provisional findings or final decision matters which are relied upon in that on the ground that the gist of the decision-maker's reasoning appears from the unredacted portions of the provisional findings or final decision. In this regard, the CMA relied upon the principles articulated in the Tribunal's decision in *BMI Healthcare Limited v. Competition Commission* ("*BMI Healthcare*"):[189]

> "We consider the following propositions to be clear:
>
> (1) The starting point in considering the Commission's duty to consult must be the Act, which deals expressly with the Commission's responsibilities in this regard, and which also makes provision for the protection of confidential information. … Sections 169(2) and (3) of the Act require the Commission to consult before making a decision, and to give reasons for that decision before it is made, but in neither case is this obligation absolute. It is qualified ("so far as practicable"), in particular by the Commission's duties in relation to specified information …
>
> (2) However, as is clear from section 241, the protection of specified information can give way "for the purpose of facilitating the exercise by the authority of any function it has under or by virtue of this Act", and one of the functions of the Commission is the Commission's duty to consult under section 169 of the Act.
>
> (3) The Act thus establishes both the duty to consult and the duty to protect confidential (specifically, "specified") information. Section 244 (set out in paragraph 15 above) then describes three conditions to which the Commission should – "so far as practicable" – have regard "before disclosing any specified information".
>
> (4) The Act thus contains a fairly comprehensive code dealing with the duty to consult and the duty to protect confidential information. There is nothing in the Act which obliges the Commission to withhold material that ought to be disclosed pursuant to the Commission's section 169 duty to consult, simply because that would involve the disclosure of specified information. But, conversely, the Commission is not obliged to disclose each and every piece of specified information as part of its duty to consult. We consider that the Act contains a perfectly clear and workable code. Although we have had in mind the statement in *Lloyd v. McMahon* [1987] 1 AC 702-703 that "it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness", we do not consider it necessary to imply into the Act anything by way of

[189] [2013] CAT 24 at [39].

additional safeguard. The provisions of the Act are, in themselves, quite sufficient for this purpose.

(5) The Commission's guidance in relation to confidential information as set out in the CC7 Guidance is entitled to great weight. None of the Applicants criticised this guidance, and it appears to set out a rational and helpful approach to dealing with specified information.

(6) Moreover, whilst what is a fair process in the context of the Act is one for the Tribunal as a matter of law, the Commission's approach in any given case is entitled to great weight. The consideration of the potentially competing interests of due process and the protection of confidential information is a nuanced one, to be undertaken in light of all the circumstances. It is the Commission, and not the Tribunal, that stands in the front line when assessing such matters, and the Tribunal should be slow to second-guess decisions of the Commission, in particular as to how confidential certain material is, and how best to protect the confidentiality in that material. We have well in mind the statement of Lloyd LJ in *R v. Panel on Take-Overs and Mergers, ex parte Guinness plc* [1990] 1 QB 146 at 184:

> "Mr. Buckley argued that the correct test is *Wednesbury* unreasonableness, because there could, he said, be no criticism of the way in which the panel reached its decision on 25 August. It is the substance of that decision, viz., the decision not to adjourn the hearing fixed for 2 September, which is in issue. I cannot accept that argument. It confuses substance and procedure. If a tribunal adopts a procedure which is unfair, then the court may, in the exercise of its discretion, seldom withheld, quash the resulting decision by applying the rules of natural justice. The test cannot be different, just because the tribunal *decides* to adopt a procedure which is unfair. Of course the court will give great weight to the tribunal's own view of what is fair, and will not lightly decide that a tribunal has adopted a procedure which is unfair, especially so distinguished and experienced a tribunal as the panel. But in the last resort the court is the arbiter of what is fair. I would therefore agree with Mr. Oliver that the decision to hold the hearing on 2 September is not to be tested by whether it was one which no reasonable tribunal could have reached."

In short, whilst it is for the Tribunal to decide what is and what is not fair, the Commission's approach should be given "great weight".

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

> taken by the Court of Appeal in *R (Eisai Limited) v. National Institute for Health and Clinical Excellence* [2008] EWCA Civ 438, which concerned the judicial review of guidance issued by NICE in relation to the use of a particular drug. Although NICE's procedures involved "a remarkable degree of disclosure and of transparency in the consultation process" (at [66]), nevertheless procedural fairness required the release of still more material – in this case, the release of a fully executable version of an economic model used by NICE, and not merely a "read only" version – so that consultees could fully check and comment on the reliability of the economic model upon which NICE had based its decision (see [49])."

(4) We consider that these principles continue to hold good, and that a person affected by a decision only needs to be informed of the gist of the case he or she has to answer. Gist is acutely context sensitive, and a decision-maker will have a wide margin of appreciation in deciding what the gist of a decision is. But if a point is considered worthy of inclusion in the provisional findings, the decision-maker cannot be heard to say that it is redundant, mere surplusage or not part of the gist. The point is either a part of the decision-maker's reasoning, on which it is consulting; or it is not – in which case it should be removed from the provisional findings altogether. If a decision-maker elects to introduce overkill into the provisional findings, that is perfectly permissible. It is just that the decision-maker must, subsequently, stand by and defend that material, and not withhold it or in some way suggest it is immaterial.

149. In our judgment, considered from first principles, the redactions applied by the CMA to details forming the reasons for its decision in both the Provisional Findings and to the Decision are difficult to defend.[190] The question is whether, as the CMA contended, the statutory regime in the Enterprise Act 2002 justifies the course taken by the CMA. It is to that regime that we now turn.

---

[190] We accept that there is a large body of law dealing with protection of information in contexts such as these, as well as in the use of confidentiality rings. See, e.g., *Woolgar v. Chief Constable of the Sussex Police* [1999] 3 All ER 604; *R (Kent Pharmaceuticals Ltd) v. Serious Fraud Office* [2004] EWCA Civ 1494; *Anan Kasei Co., Limited v. Neo Chemicals & Oxides (Europe) Limited* [2020] EWHC 2503 (Pat) and [2021] EWHC 2825 (Pat). We do not consider the detail of such case-law, because there is a very specific statutory regime that governs.

(b) The regime in the Enterprise Act 2002

(i) Duty to consult

150. Section 104 of the Enterprise Act 2002 contains a duty to consult in the case of certain decisions, including decisions (as here) made under section 35(1):[191]

> "(1) Subsection (2) applies where the relevant authority is proposing to make a relevant decision in a way which the relevant authority considers is likely to be adverse to the interests of a relevant party.
>
> (2) The relevant authority shall, so far as practicable, consult that party about what is proposed before making that decision.
>
> (3) In consulting the party concerned, the relevant authority shall, so far as practicable, give the reasons of the relevant authority for the proposed decision.
>
> (4) In considering what is practicable for the purposes of this section the relevant authority shall, in particular, have regard to –
>
> (a) any restrictions imposed by any timetable for making the decision; and
>
> (b) any need to keep what is proposed, or the reasons for it, confidential."

(ii) Duty not to disclose information

151. Part 9 of the Enterprise Act 2002 contains a series of provisions restricting the disclosure of information. Section 237 materially provides:

> "(1) This section applies to specified information which relates to –
>
> (a) the affairs of an individual;
>
> (b) any business of an undertaking.
>
> (2) Such information must not be disclosed –
>
> (a) during the lifetime of the individual, or
>
> (b) while the undertaking continues in existence,
>
> unless the disclosure is permitted under this Part. …"

[191] See section 104(6)(a)(iii).

This information is referred to in the 2002 Act as "specified information", which term we adopt.

152. Information is specified information if it comes to the CMA in connection with the exercise of its functions,[192] which includes the investigation of this Merger. Given width of the definition of specified information, it is safe to proceed on the basis that all of the material redacted in the Provisional Findings and in the Decision was specified information.

153. The Enterprise Act 2002 then contains a series of sections describing disclosures of specified information that are permitted. The permitted disclosures are, subject to certain qualifications, as set out in the relevant section, namely:

(1) Where the person whose information it is consents: section 239.

(2) Where disclosure is "for the purpose of facilitating the exercise by the authority of any function it has under or by virtue of this Act or any other enactment": section 241(1). This, in our judgment, is a critical provision, and we will be returning to it.

(3) Disclosure for the purpose of civil proceedings: section 241A.

(4) Disclosure for the purpose of criminal investigation or proceedings: section 242.

(5) Disclosure to an overseas public authority: section 243.

154. The Enterprise Act 2002 identifies the considerations that the CMA must have regard to before disclosing any specified information. These are set out in section 244:

"…

[192] Section 238(1) of the Enterprise Act 2002.

(2) The first consideration is the need to exclude from disclosure (so far as practicable) any information whose disclosure the authority thinks is contrary to the public interest.

(3) The second consideration is the need to exclude from disclosure (so far as practicable) –

(a) commercial information whose disclosure the authority thinks might significantly harm the legitimate business interests of the undertaking to which it relates, or

(b) information relating to the private affairs of an individual whose disclosure the authority thinks might significantly harm the individual's interests.

(4) The third consideration is the extent to which the disclosure of the information mentioned in subsection (3)(a) or (b) is necessary for the purpose for which the authority is permitted to make the disclosure."

155. These disclosure provisions are buttressed by the criminal law.[193]

(iii) Section 241: statutory functions

156. Section 241 of the Enterprise Act 2002 provides:

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

(2) If information is disclosed under subsection (1) so that it is not made available to the public it must not be further disclosed by a person to whom it is so disclosed other than with the agreement of the public authority for the purpose mentioned in that subsection.

(2A) Information disclosed under subsection (1) so that it is not made available to the public must not be used by the person to whom it is disclosed for any purpose other than that mentioned in subsection (1).

(3) A public authority which holds information to which section 237 applies may disclosure that information to any other person for the purpose of facilitating the exercise by that person of any function he has under or by virtue of –

(a) this Act;

(b) an enactment specified in Schedule 15;

(c) such subordinate legislation of the Secretary of State may by order specify for the purposes of this subsection.

[193] Section 245 of the Enterprise Act 2002.

(4) Information disclosed under subsection (3) must not be used by the person to whom it is disclosed for any purpose other than a purpose relating to a function mentioned in that subsection.

…"

(c) Analysis of the Enterprise Act 2002 disclosure regime

157. We consider that not only does the Enterprise Act 2002 regime that we have described not preclude the disclosure to Meta of the redacted material, it actually obliges the CMA to take that course:

(1) Quite clearly, the Merger investigation, first reflected in the Provisional Findings and culminating in the Decision, was "likely to be adverse to the interests" of Meta. A duty to consult therefore arose, pursuant to section 104(1) of the Enterprise Act 2002. The CMA was obliged to consult Meta "so far as practicable" before making the Decision;[194] and, in consulting Meta, the CMA was obliged, so far as practicable, to give the reasons for the proposed decision.[195]

(2) "Practicability" obliges the CMA to consider – amongst other things – the need to keep what it proposes or the reasons for it confidential.[196]

(3) The primary vehicle for communication of the CMA's proposed decision and reasons was – or should have been – the Provisional Findings. For the reasons we have given, we consider that excisions to or redactions from the Provisional Findings of the CMA's reasons are difficult to defend and *prima facie* impermissible. Either the information excised or redacted is unnecessary to justify the CMA's reasoning – in which case it should be omitted where the CMA considers it cannot be disclosed – or it is necessary, in which case the information ought, *prima facie*, to be produced to Meta. We do not consider that a competition authority like the CMA can be permitted to say that the gist of its reasoning appears in the redacted Provisional Findings unless that

[194] Section 104(2) of the Enterprise Act 2002.
[195] Section 104(3) of the Enterprise Act 2002.
[196] Section 104(4) of the Enterprise Act 2002.

outcome is compelled by the regime in the Enterprise Act 2002. In other words, the complete wording of the Provisional Findings constituted, for these purposes, the gist.

(4) We proceed (as we have said) on the basis that all of the redacted or excised material was specified information within the meaning of section 237, and that it came to the CMA in connection with the exercise of its functions, for the purposes of section 238(1). Disclosure of this information was, therefore, restricted unless the disclosure was permitted in accordance with the regime in the Enterprise Act 2002.

(5) The "gateway" permitting disclosure of the redacted or excised material was section 241, which provides that a public authority which holds information to which section 237 applies may disclose that information for the purpose of facilitating the exercise by the authority of any function it has under or by virtue of (amongst other things) the Enterprise Act 2002.[197] It is important to note that under section 241, disclosure is not all or nothing. Permitted disclosure under section 241 can be far narrower than disclosure to the public. This is clear from section 241(2), which makes clear that if disclosure is made to a particular person, and not to the public, that persons comes under an obligation not to further disclose that information that is also buttressed by the criminal sanctions contained in section 245.

(6) Thus, when considering disclosure under section 241(1), the CMA was obliged to consider not only what could properly be disclosed but to whom. We consider that it would have been difficult to justify a completely public disclosure of the redacted or excised material: there is no obligation to consult the public under section 241. But that is not the question. The question, rather, is whether there should have been disclosure of this material to Meta, as the party to whom the duty to consult was owed and, if so, in what manner. In particular, the important

[197] Section 241(1).

question would arise as to whether the redacted or exised material could be withheld from Meta, but disclosed to Meta's external advisers.

(7) The manner in which the question of to whom to disclose should be approached was considered in *BMI Healthcare*:

> "40. In the ordinary course, how an affected party participated in the consultation process described above should be up to the affected party. The affected party may choose to act by him-, her- or it-self, or through agents, like lawyers. However, just as the duty to consult is context-sensitive, so too is this aspect of the consultation process. There are circumstances when the affected party's choice as to how it participates in the consultation process will be limited or circumscribed.
>
> 41. Instances where an affected party's right in this regard has been circumscribed have received great prominence in two recent decisions of the Supreme Court, *Al Rawi & Ors v. Security Service & Ors* [2011] UKSC 34 and *Bank Mellat v. Her Majesty's Treasury (No. 1)* [2013] UKSC 38. Both of these cases considered the operation of a "closed material procedure" in court proceedings, a closed material procedure being defined in *Bank Mellat* at [1] as a procedure involving "the production of material which is so confidential and sensitive that it requires the court not only to sit in private, but to sit in a closed hearing (i.e. a hearing at which the court considers the material and hears submissions about it without one of the parties to the appeal seeing the material or being present), and to contemplate giving a partly closed judgment (i.e. a judgment part of which will not be seen by one of the parties)."
>
> 42. The point about a closed material procedure is not that material is withheld, but that the persons able to look at such material are circumscribed. At its most extreme, a closed material procedure involves an advocate acting for an affected party in court proceedings, but in circumstances where, once that advocate has seen the "closed" material, he or she is precluded from taking instructions from the affected party.
>
> 43. Self-evidently, a closed material procedure constitutes a derogation from the principle of natural justice. In *Bank Mellat* at [3], the Supreme Court expressed itself in trenchant terms:
>
> > "Even more fundamental to any justice system in a modern, democratic society is the principle of natural justice, whose most important aspect is that every party has a right to know the full case against him, and the right to test and challenge that case fully. A closed hearing is therefore even more offensive to fundamental principle than a private hearing. At least a private hearing cannot be said, of itself, to give rise to inequality or even unfairness as between the parties. But that cannot be said of an arrangement where the court can look at evidence or hear arguments on behalf of one party without the other party ("the excluded party") knowing, or being able to test, the contents of that evidence and those

arguments ("the closed material"), or even being able to see all the reasons why the court reached its conclusions."

44. Taken to their logical extremes, *Al Rawi* and *Bank Mellat* might be taken to express extreme disapprobation of the Commission's use of confidentiality rings and data rooms – and, indeed, this Tribunal's use of confidentiality rings. After all, confidentiality rings tend to be limited to external advisers (generally, lawyers and, in some cases, economists and accountants) and to exclude the affected party (including the affected party's in-house lawyers). The same is true, only even more so, of data rooms.

45. We are very confident that the Supreme Court did not have in mind market investigation references in the Commission in either *Al Rawi* or *Bank Mellat*, and certainly these were not considered by the Supreme Court. Before us, none of the parties suggested that these decisions did anything more than highlight the fact that closed material procedures – and we use that term widely to embrace both confidentiality rings and data rooms – have to be justified by the circumstances, and should be as narrowly used as is possible in those circumstances. But, what those circumstances are is of enormous significance.

46. Accordingly, the provisions of the Act allow the Commission a broad discretion in formulating closed procedures, but subject always to the section 169 duty to consult."

(8) We consider that the CMA should have approached the question of disclosure of the redacted or excised material in this way. Disclosure to Meta was necessary to facilitate the exercise of the CMA's functions, because consultation with an affected party is a necessary part of due process. However, this disclosure would involve disclosure of specified information and its disclosure would, therefore, have to be justified by reference to all relevant considerations, including in particular those set out in section 244. This would involve balancing the degree of sensitivity in the information (in particular, section 244(3)(a) obliges consideration of the extent to which disclosure might significantly harm the legitimate business interests of the undertaking to which it relates) against the necessity to make the disclosure (as described in section 244(4)).

(9) We have some considerable doubts as to whether this balancing exercise was properly carried out in this case. The CMA's principal focus seems to have been much more on protecting third party material, generally disclosing that material where third party consent was obtained. In other

words, the permitted disclosure gateway accorded primary consideration was section 239. But we consider the critical "gateway" to have been section 241 (taking account of the "considerations" set out in section 244, and, in this case, section 244 (4) in particular), in that consultation was necessarily a part of the CMA's functions. As we have made clear, the ability to challenge the Decision under section 120(4) is by way of judicial review only. The only point in time at which an affected party gets to challenge the CMA's views on the merits is during the consultation process. If this was an on the merits review, it may be that the level of consultation could be scaled back: but the merits are emphatically not to be considered on a judicial review, and that renders the integrity of the consultation process all the more important.

(10) McIntosh 1 describes the process of reviewing the Provisional Findings for confidential specified information, and it is quite clear (from, e.g., McIntosh 1/§24) that third party consent was the primary vehicle for justifying the release of third party information:

> "24. Disclosure of third-party information typically occurs post-[Provisional Findings] once all confidentiality representations have been put back. This has been the CMA's consistent practice in mergers investigations since the CMA's creation. The majority of third-party information is usually disclosed unredacted in the [Provisional Findings], which often contain extensive third-party evidence that the CMA is able to include in the [Provisional Findings] unredacted because third parties did not object to it being disclosed during the put-back process described above at paragraph 21. It is often not possible to include much third-party evidence at an earlier stage of the inquiry (such as on publication of the Annotated Issues Statement or working papers) because at that stage the Case Team is often still in the process of gathering and analysing third-party evidence and assessing its relevance.
>
> 25. The Disclosure Guidance sets out various ways in which access may be allowed to confidential information while still providing protection for that information. These methods include "*disclosure subject to restrictions (for example, disclosure to parties' professional advisers subject to receipt of undertakings)*" although this is not one of the "*usual approaches to take*". This is because disclosure into a confidentiality ring does not entirely address all confidentiality concerns. The CMA is reliant on the parties' advisers respecting the terms of such undertakings and there remains a risk of inadvertent disclosure by external advisers to their clients (for example where they are consulting their clients in order to prepare submissions to the CMA). When disclosing specified information in

> the context of a merger inquiry the CMA is under an obligation to comply with Part 9 of EA02, and therefore even when disclosing information into a confidentiality ring the CMA must have regard to the considerations set out in section 244 of [the Enterprise Act 2002]. The CMA must ensure that any disclosure goes only so far as is necessary for the purpose for which the CMA is making the disclosure. Accordingly, when the CMA makes use of confidentiality rings in merger inquiries the CMA typically imposes restrictions on who from, or on behalf of, the merger parties can access information in the confidentiality ring. This typically involves restricting the number of participants in the ring and often the CMA restricts access to external legal and/or economic advisers only."

(11) This betrays a failure properly to appreciate the balancing that needs to occur between the protection of confidential information and the necessity of disclosure. To be clear, we consider that consultation is a necessary part of a fair process and not an optional extra. Equally, whilst consent to release of specified information is, of course, very relevant, the CMA must balance the necessity of a fair process against the extent to which disclosure will actually harm third party interests. As we have noted, section 244(3)(a) obliges consideration of the extent to which disclosure might significantly harm the legitimate business interests of the undertaking to which it relates.

(12) In the first place, therefore, a confidentiality ring including persons from Meta should have been considered. We do not propose to say very much more about this, because that was not Meta's point on this application, although Meta certainly did not accept that it should have been excluded from the Ring. However, we would want to stress that confidentiality rings limited only to external advisers are known and – in the appropriate circumstances – can be justified. We heard no argument on this, and Meta's point was that there was no justification for not disclosing unredacted material into an external advisor only confidentiality ring such as the Ring. We consider that submission to be correct. Confidentiality rings are taken seriously by the professionals who participate in them, and the fact that this process "does not entirely address all confidentiality concerns" (even if right, which we doubt) is asking the wrong question. Confidentiality concerns should be given due

weight: but that involves balancing those concerns against the importance of consultation.

158. It follows that this aspect of Ground 4 must succeed. The excisions to the Provisional Findings were unlawful and cannot be justified by reference to the regime in the Enterprise Act 2002. Section 38 of the Enterprise Act 2002[198] obliges the CMA to publish a report on the merger decision, together with the reasons. Precisely the same balancing exercise needs to be conducted, and we would regard it as a safe presumption that what is produced as part of the Provisional Findings ought also to be produced (assuming the passage survives consultation) in the same way when the Decision comes to be published. This approach is buttressed by the fact that the CMA does not appear to have the authority – which the Secretary of State does have – of making excisions from its reports.[199] In other words, whilst the CMA may redact on grounds of confidentiality, such that the full decision is only published to a limited number of persons, what the CMA may not do is keep to itself the full decision, and publish only a partial decision.[200]

159. We circulated a version of this Judgment in draft to the parties and invited the CMA in particular to consider the effect of this Judgment on its future practice. Obviously, nothing in this Judgment can say anything about how the CMA deals with future fact-specific questions of disclosure, which is entirely a matter for it, but it may be helpful if – without prejudice to any stance the CMA may adopt in the future – we make clear the following points:

(1) The CMA does, of course, have powers to compel information from third parties, but (entirely unsurprisingly) prefers to seek the voluntary provision of confidential information from third parties. Such voluntary provision is, typically, contingent upon third parties being satisfied that the information they disclose to the CMA is appropriately protected.

---

[198] Set out in paragraph 138 above.
[199] See section 118 of the Enterprise Act 2002. This section does not apply in the present case at all.
[200] No doubt there are exceptions to this, where there is material that justifies a closed-material process. See, for example, *R (Haralambous) v. Crown Court at St Albans*, [2018] UKSC 1.

(2) That means that the CMA will have a considerable margin of appreciation, which this Tribunal will respect, in determining how it approaches the treatment of third party material and how it frames the relevant confidentiality rings to protect that information.

(3) We make clear that we regard confidentiality rings confined only to the external advisers of the interested parties as an appropriate course of action in an appropriate case; and that the CMA is, in the first instance, the best judge of this. In particular, we would want to stress that the exclusion of Meta from the Ring in this case – whilst a matter on which both Meta and Snap feel strongly about and see very differently – was not a matter on which we heard submissions. To the extent we need to do so in the future, we will of course do so. It may be that further submissions on this point will have to be received, particularly if there has to be a further hearing in this matter.

(4) Ground 4, element 1: failure to disclose or to make adequate inquiries

160. We do not propose to consider this aspect of Ground 4 separately. The fact is that we consider that the Snap Information was material that should have been disclosed more fully and sooner by placing the (unredacted) Provisional Findings in the Ring, for the reasons that we have given. Had the CMA taken this approach to the Provisional Findings, then it may be that this might have informed the CMA's conduct as regards disclosing the Snap Information into the Ring at an even earlier date.[201] But this draws us into speculation that we do not consider to be profitable.

161. We do not consider that it is appropriate to consider whether, if our decision had been different in relation to the other element of Ground 4, this ground would have succeeded. The fact is that we have been able to decide Ground 4 without reference to the detailed content of the redacted information, and we do not consider that it is helpful for us now to be drawn into such consideration. We also do not consider that it is necessary, given our findings, to explore the extent

[201] Of course, entirely a matter for the CMA.

to which the CMA failed to make adequate inquiries of Snap. Whilst we have no doubt that Meta would have pushed back hard in relation to the Snap Information, and so perhaps caused the CMA to seek further information to justify its position (which, of course, is the point of consultation), we doubt very much whether the CMA can be criticised for making insufficient inquiries of Snap or any other person assuming there was proper consultation. These are matters that fall emphatically within the investigative purview of the CMA, and we see no basis for suggesting that the CMA's investigation was impeachable on a judicial review.

D. REMEDIATION CHALLENGES

(1) Introduction

162. During the course of the hearing, it became apparent that it would not be possible for the parties to address us fully on the Remediation Challenges, simply because the issues these challenges raised would be contingent upon our determination of the anterior challenges to the Decision, namely the Substantive Challenges and the Procedural Challenges.

163. Thus, by way of example, if the Procedural Challenges all failed, but the Substantive Challenges succeeded in whole or in part, two difficult questions would arise:

(1) First, to what extent could the decision regarding the existence of the Vertical SLC continue to stand? As we have described, the Vertical SLC finding in the Decision was not directly under attack, but Mr Jowell, QC submitted that (depending on how they were determined) the Substantive Challenges to the Horizontal SLC might infect or affect the decision as regards the Vertical SLC. Obviously, since the outcome of the Substantive Challenges was unknown at the time of the hearing, neither party could address us on this point.

(2) Secondly, even if the outcome of the Substantive Challenges to the Horizontal SLC did not affect the decision as regards the Vertical SLC,

it would be necessary to consider whether the remedies imposed by the CMA in respect of both SLCs could properly stand where only the Vertical SLC survived the application. This is the substance of Ground 5, and we did hear some submissions in relation to this ground.

164. Nevertheless, the fact remains that arguing the Remediation Challenges fully presented a challenge to both parties, and we are grateful to all counsel for the way in which they rose to this challenge. We indicated, during the course of the hearing, that we would seek to decide as many of the Remediation Challenges as we properly could, consistent with the overriding objective to conduct a fair hearing and to hear both parties fully on all points.

165. We have concluded that the Substantive Challenges all fail. We have also concluded that, whilst one of the three Procedural Challenges fails, and a second has not needed to be determined, the third –unlawful excisions – succeeds for the reasons we have given. This, then, is the context in which we proceed to consider the Remediation Challenges. As to this:

(1) We can, without more, dismiss Ground 5. Ground 5 is predicated on a successful challenge to the Horizontal SLC, which meant that the remedies ordered by the CMA have to be justified by the Vertical SLC only. Meta's point in this regard was twofold: first, divestiture could not rationally be justified by the Vertical SLC alone; secondly, and relatedly, the CMA has not, on the face of the Decision, actually considered this question. Divestiture as an appropriate remedy for the Vertical SLC on its own was not or not sufficiently considered in the Decision. Given our conclusions as regards the Substantive Challenges, the point simply does not arise; and we do not propose to address what is a hypothetical or academic question.[202]

(2) On the other hand, Meta's success in relation to Ground 4 *prima facie* undermines the entirety of the Decision. We stress that we make

[202] See, e.g., *R (Heathrow Hub Limited) v. The Secretary of State for Transport*, [2020] EWCA Civ 213 at [208].

absolutely no decision in this regard, because we consider that we need to hear further from the parties on the consequences of the procedural failure that we have identified and, in particular, on the question as to whether that failure obliges us to remit the Decision to the CMA for fresh consideration. However, we do consider that it is appropriate to decide what is the applicable test to determine that question. The question, in brief, is whether that test is the common law test articulated in *Simplex GE (Holdings) v. Secretary of State for the Environment*[203] or whether the statutory test in section 31(2A) of the Senior Courts Act 1981 governs. We invited the parties to provide – if so advised – further written submissions on this point, and we have taken those written submissions fully into account. It seems to us that it is necessary to decide this question now, so that the argument on remittal can be properly focussed.

(3) That leaves Ground 6, which concerns the appropriateness of the remedies ordered by the Decision, even if the Decisions as regards the Vertical and the Horizonal SLCs both stand. We heard argument on the point, and it seems to us that we ought to decide it, even though the question only arises should we not remit the Decision to the CMA to be made again. Since the question of remission is open, and to be decided, the question is not academic, and we consider that Ground 6 can and should be determined in this Judgment.

166. Accordingly, this Section considers, first, whether section 31(2A) of the Senior Courts Act 1981 governs; and, secondly, Ground 6.

(2) Application of section 31(2A) of the Senior Courts Act 1981

167. As Fordham notes, a judicial review claim may fail at common law if lacking in substance, as where it is non-material, non-prejudicial, futile, academic or

[203] (1989) 57 P & CR 306.

premature.[204] The common law rules regarding materiality have been augmented by section 31(2A) of the Senior Courts Act 1981, which provides:

> "The High Court —
>
> (a) must refuse to grant relief on an application for judicial review …
>
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

168. We say nothing about the difference between the common law and statutory tests as regards remedy, and nothing about whether any such difference would or would not be determinative in the present case. We are simply seeking to determine whether this provision applies in the case of this application. We do, however, proceed on the basis – for the purposes of the question of statutory interpretation that arises – that section 31(2A), which was inserted into the Senior Courts Act 1981 by the Criminal Justice and Courts Act 2015, was intended to make a material change in the law.

169. Section 120(4) of the Enterprise Act 2002 provides that in determining applications such as the present, "the Competition Appeal Tribunal shall apply the same principles as would be applied by a court on an application for judicial review". The question is whether this wording causes section 31(2A) of the Senior Courts Act 1981 to apply. In their written submissions to us, the CMA contended that section 31(2A) did apply, whereas Meta contended that it did not.

170. As to this:

(1) Both Meta and the CMA were agreed that this was an open question, and that although similar points had arisen in proceedings before other tribunals, there was no decision binding on this Tribunal.

(2) More to the point, such discussion and determination as there had been before other tribunals in relation to analogous, but not identical,

[204] See, e.g., Fordham, *Judicial Review Handbook* (7th ed, Hart Publishing, 2020), P4 Materiality at page 37.

provisions to section 120(4) of the Enterprise Act 2002 do not speak with a single voice. Thus, in *MB v. Secretary of State for the Home Department*,[205] Mitting J considered that section 31(2A) did apply to proceedings before the Special Immigration Appeals Commission ("SIAC"). Contrary views were expressed in *MWH v. Secretary of State for the Home Department*[206] and *LA v. Secretary of State for the Home Department*.[207] In both of these latter cases, the tribunal noted that in other cases (e.g., in the case of the Upper Tribunal) express legislative changes had been made to render section 31(2A) of the Senior Courts Act 1981 applicable.[208] The CMA helpfully referred us to *dicta* in three Court of Appeal decisions,[209] but these, too, relate to different statutory provisions and also point in different directions. The most that we derive from the case law is that it is significant that in some cases Parliament has expressly extended the ambit of section 31(2A) to non-High Court proceedings, which we take as an indicator (but no more than that) that section 31(2A) does not apply without some explicit legislative indicator.[210] But we do not consider this point to be of great moment: at the end of the day, this is a question of statutory construction.

(3) We conclude that section 31(2A) of the Senior Courts Act 1981 does not apply to the determination of applications such as this pursuant to section 120(4) of the Enterprise Act 2002:

(i) The schema of section 120 of the Enterprise Act 2002 draws a distinction between *(a)* principles applied on an application for

---

[205] Appeal No: SN/47/2015, SIAC judgment of 22 December 2016.
[206] Appeal No: SN/57/2015, SIAC judgment of 4 October 2017.
[207] Appeal No: SN/63, 64, 65 and 67/2015, SIAC judgment of 24 October 2018.
[208] Thus, the Tribunal, Courts and Enforcement Act 2007 was amended by the Criminal Justice and Courts Act 2015 to provide at section 15(5A):
"In cases arising under the law of England and Wales, subsections (2A) and (2B) of section 31 of the Senior Courts Act 1981 apply to the Upper Tribunal when deciding whether to grant relief under subsection (1) as they apply to the High Court when deciding whether to grant relief on an application for judicial review."
[209] *Abdelrahim Alibkhiet v. London Borough of Brent* [2018] EWCA Civ 2742; *Steven Forward v. Aldwyck Housing Group Limited* [2019] EWCA Civ 1334; and *GA v. Secretary of State for the Home Department* [2022] EWCA Civ 304.
[210] We certainly accept the CMA's point that the wording of section 120(4) of the Enterprise Act 2002 could be wide enough to import section 31(2A) of the Senior Courts Act 1981 (as inserted by the Criminal Justice and Courts Act 2015).

judicial review and *(b)* remedies where a claim for judicial review has succeeded:

> "(4) In determining such an application the Competition Appeal Tribunal shall apply the same principles as would be applied by a court on an application for judicial review.
>
> (5) The Competition Appeal Tribunal may –
>
> (a) dismiss the application or quash the whole or part of the decision to which it relates; and
>
> (b) where it quashes the whole or part of that decision, refer the matter back to the original decision maker with a direction to reconsider and make a new decision in accordance with the ruling of the Competition Appeal Tribunal."

If remedies on a successful judicial review were to be determined strictly according to "the … principles as would be applied by a court on an application for judicial review", section 120(5) would be redundant. The presence of an express discretion regarding remedy ("may") strongly suggests a discretion informed by the jurisprudence of the United Kingdom, but which is the Tribunal's own.

(ii) That is consistent with the fact that the Tribunal is a Tribunal of the United Kingdom. We accept, of course, that in all cases proceeding before it, the Tribunal is required to determine whether the proceedings or any part of them are to be treated as proceedings in England and Wales, in Scotland or in Northern Ireland.[211] In this case, as we have noted,[212] the Tribunal has ordered that these proceedings are to be treated as proceedings in England and Wales. But the significant lessening of competition that we have been considering has been in markets in the United Kingdom, and it would be odd (to say no more than that) if remedies were to differ according to whether proceedings are treated as being in one jurisdiction rather than another. The

[211] See rule 18 of the Tribunal Rules.
[212] See paragraph 11 above.

Senior Courts Act 1981 has no application in Scotland, and we regard it as undesirable for rule 18 to become a forensic battleground between applicant and respondent because judicial review remedies are different in one jurisdiction rather than another.

171. For these reasons, we hold that section 31(2A) of the Senior Courts Act 1981 does not apply in this case. We say nothing more about the question of remission or otherwise: that, as it seems to us, is a matter on which we will need to hear submissions at a later date.

(3) Ground 6: irrationality in remediation

172. A broad discretion is conferred on the CMA in crafting remedies in relation to completed mergers under section 35 of the Enterprise Act 2002. Section 41 of the Enterprise Act 2002, which places a duty on the CMA to craft remedies, provides:

> "(1) Subsection (2) applies where a report of the CMA has been prepared and published under section 38 within the period permitted by section 39 and contains the decision that there is an anti-competitive outcome.
>
> (2) The CMA shall take such action under section 82 or 84 as it considers to be reasonable and practicable –
>
> (a) to remedy, mitigate or prevent the substantial lessening of competition concerned; and
>
> (b) to remedy, mitigate or prevent any adverse effects which have resulted from, or may be expected to result from, the substantial lessening of competition.
>
> (3) The decision of the CMA under subsection (2) shall be consistent with its decisions as included in its report by virtue of section 35(3) or (as the case may be) 36(2) unless there has been a material change of circumstances since the preparation of the report or the CMA otherwise has a special reason for deciding differently.
>
> (4) In making a decision under subsection (2), the CMA shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it.
>
> (5) In making a decision under subsection (2), the CMA may, in particular, have regard to the effect of any action on any relevant customer benefits in relation to the creation of the relevant merger situation concerned."

173. For purposes of this ground, we proceed on the basis that the decisions regarding both the Vertical and the Horizontal SLCs are unimpeachable, and that the remediation ordered is in relation to both SLCs. We also note – and this was not disputed by Meta – that section 41 confers a wide discretion on the CMA ("shall take such action … as it considers to be reasonable and practicable … to remedy, mitigate or prevent the substantial lessening 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").

174. Meta contended that the remediation ordered by the CMA was unlawful in the following respects:

(1) *Requirement that Meta provide at least US$75 million in cash to GIPHY.* The fact is that GIPHY was, prior to the Merger, a self-standing and independent commercial entity, albeit one which (as we have noted) was holding its head above water and no more. Remediation of the Vertical and Horizontal SLCs found requires not the replication of an entity that might go under (this was not the Decision's counterfactual) but the establishment of an entity capable of bringing about the dynamic competition that the Decision identifies. We accept that there is room for debate as to the extent to which GIPHY should be capitalised, and that that amount might be more or less than US$75 million. But that, we consider, is a matter for the CMA, and unless the remediation outcome is irrational, it cannot and should not be successfully challenged.

(2) *Requirement on a purchaser to show commitment to the United Kingdom.* The absence of GIPHY's expansion of Paid Alignment advertising into the UK market was a loss of dynamic competition caused by the Merger, which the Decision identified.[213] We consider that it was incumbent upon the CMA to consider how to remedy this impairment, and the requirement is (if we may say so) an obvious way of doing so.

[213] See paragraphs 98, 120 and 122 above.

(3) *Requirement on Meta to continue accepting the supply of GIFs by GIPHY in the short term.* This does no more, we consider, than restore the *status quo ante* prior to the Merger. Indeed, we consider that the CMA could have gone further, and reviewed the basis on which Paid Alignment advertising could be conducted by GIPHY, given Meta's significant market power in the social media market.[214] The CMA did not do so. We consider the requirement as imposed to be well within the CMA's remediation powers.

For all these reasons, Ground 6 fails.

E. CONCLUSIONS AND DISPOSITION

175. With the exception of (part of) Ground 4, none of the grounds in the NoA succeed and we unanimously dismiss them. We have concluded, however, that the CMA has failed properly to consult and has wrongly excised portions from the Decision, for the reasons given in paragraphs 157 and 158 above.

176. We have confirmed that we do not consider section 31(2A) of the Senior Courts Act to apply in the case of this application,[215] but we say no more about the remedy that should be ordered, if any, in relation to Meta's success in relation to the second element of Ground 4.

177. We invite the parties to consider what consequential orders should be made and – more particularly – to identify how and when the question of remittal can be determined. We consider that this needs to be resolved sooner rather than later.

[214] See paragraphs 55, 120(3) and 124(4) above.
[215] See paragraphs 170(3) and 171 above.

Sir Marcus Smith
President

Professor John Cubbin

Simon Holmes

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

Date: 14 June 2022

ANNEX 1

TERMS AND ABBREVIATIONS USED IN THE JUDGMENT

(paragraph 1, footnote 1 of the Judgment)

TERM OR ABBREVIATION USED	FIRST USE IN THE JUDGMENT
API	Paragraph 45
App	Paragraph 45
BMI Healthcare	Paragraph 148(3)
Carltona	Paragraph 141
CMA	Paragraph 6
CMA Board	Paragraph 131
CMA group	Paragraph 133
CMA Market Study	Paragraph 52
CMA panel	Paragraph 133
Decision	Paragraph 8
display advertising	Paragraph 9(2)(i)
dynamic competition	Paragraph 14(1)(i)
Gfycat	Paragraph 13(3)
GIF Consumers	Paragraph 45
GIF Provider	Paragraph 46
GIF stickers	Paragraph 2
GIFs	Paragraph 2
GIPHY	Paragraph 2
Global Radio	Paragraph 24(1)
Group	Paragraph 7
Horizontal SLC	Paragraph 9(2)(i)
Interveners	Paragraph 15
McIntosh 1	Paragraph 17(1)
McIntosh 2	Paragraph 17(1)
McIntosh 3	Paragraph 17(1)
McIntosh 4	Paragraph 17(1)
Merger	Paragraph 5
Merger Assessment Guidelines	Paragraph 24(4)(i)
Meta	Paragraph 1

TERM OR ABBREVIATION USED	FIRST USE IN THE JUDGMENT
NoA	Paragraph 12
O&O	Paragraph 45 footnote 45
Paid Alignment	Paragraph 14(2)(i)
potential competition	Paragraph 13(1)
Procedural Challenges	Paragraph 19
Provisional Findings	Paragraph 8
Re King	Paragraph 142
Remediation Challenges	Paragraph 19
Ring	Paragraph 14(4)(ii)
SDKs	Paragraph 45
search advertising	Paragraph 56
SIAC	Paragraph 170(2)
Snap	Paragraph 13(3)
Snap Information	Paragraph 140(4)
Social Media Consumers	Paragraph 54
Social Media Providers	Paragraph 54
specified information	Paragraph 151
static competition	Paragraph 26
Substantive Challenges	Paragraph 19
Tenor	Paragraph 14(4)(i)
Tribunal Rules	Paragraph 11
Vertical SLC	Paragraph 9(2)(ii)
video GIFs	Paragraph 2