IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1366/4/12/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP
(Remote Hearing)

Monday 19 October 2020

Before:

HODGE MALEK QC
(Chairman)
TIM FRAZER
TIMOTHY SAWYER CBE
(Sitting as a Tribunal in England and Wales)

BETWEEN:

(1) FACEBOOK, INC.
(2) FACEBOOK UK LIMITED

Applicants

v

COMPETITION AND MARKETS AUTHORITY

Respondent

A P P E A R AN C E S

Robert O'Donoghue QC, Gerard Rothschild, Tom Pascoe (instructed by Latham & Watkins (London) LLP on behalf of the Applicants)
Marie Demetriou QC and Brendan McGurk, Emma Mockford. (instructed by the Competition and Markets Authority on behalf of the Respondent)

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Monday 19 October 2020

(2.00 pm)

THE CHAIRMAN: Good afternoon, I am Hodge Malek. I am sitting with Tim Sawyer and Tim Frazer. There are a few things I would like to start off with.

It's a contempt of court to record, broadcast or stream this hearing. There are transcribers who will provide a transcript which will be available on the website of the Tribunal in due course.

Everyone should be on mute save for the Tribunal and any person who is speaking. I expect only to see leading counsel and the Tribunal on the video.

When counsel refer to a document, they should say which bundle it's in, give a tab number and page references.

We have read the whole of bundle A to E, bundle I, the miscellaneous bundle. We haven't been through all the exhibits again, although we did look at the exhibits at the time when they originally were filed.

There are certain things which we have specifically read in advance of the hearing, such as the Interim Measures Guidance and some of the main authorities cited.

I've been through the hyperlinked chronology, which is very, very useful because it's so easy to find documents that way.

I would like to thank Latham & Watkins for preparing the bundle. Electronic bundles are really easy to work through, it's well laid out. I know it would have been quite a lot of work to put all that together.

We will have a break some time between 3.15 and 3.30, depending on when it's convenient for Mr O'Donoghue to take a break of ten minutes, and we will finish at 5 or thereabouts and we will see where we are at 5 on timing.

So Mr O'Donoghue, you have the floor.

Submissions by MR O'DONOGHUE

MR O'DONOGHUE: Sir, I am grateful. For the record I had better introduce the cast.

I appear on behalf of the applicant, Facebook, with Mr Rothschild and Mr Pascoe; Ms Demetriou for the CMA, with Mr McGurk and Ms Mockford.

This case concerns the fascinating topic of GIFs. Speaking personally, I had only just got my head around the concept of an emoji, but a GIF is a video or animation which is useful for conveying jokes, emotions or ideas, usually based on a TV programme or film, or so I am told.

GIPHY is one of a number of supplier of GIFs. Another major supplier is Tenor, which is owned by Google. Since around 2015, GIPHY has supplied GIFs to Facebook, particularly of course to its social media platform, Facebook, as well as Instagram, which is a photo and video-sharing messenger which concerns messages, and WhatsApp.

Indeed, Facebook is GIPHY's largest customer for GIFs, and if the Tribunal is interested, the actual percentage, which is confidential, can be found in the draft merger notice at paragraph 19.43. That's hearing 1, F23/533.

The transaction closed in around mid-May 2020. The Tribunal will have seen the acquisition figure. It's all relative, of course, but for perspective, the GIPHY revenue pre-transaction was about 0.025 per cent of Facebook's.

The transaction was not notified, since there is no need to notify the United Kingdom, and Facebook thought, and still thinks, the CMA does not have jurisdiction to review the transaction.

There are, as you saw in our skeleton, around 120 merger control authorities

worldwide. No other merger control authority in Europe is currently looking at this transaction.

Outside of Europe, only Australia, which also has a voluntary merger regime, and the Federal Trade Commission of the United States, has expressed any interest in the transaction, although I emphasise the FTC has not taken the step of issuing a request for further information, the so-called second request.

Neither the United States nor Australia has powers to impose a hold separate arrangement for GIPHY. They would have to go to court for that purpose, and they haven't done so, at least not yet.

So the CMA is the only authority anywhere in the world imposing the types of global restrictions on Facebook that we seek partial derogations in relation to.

In terms of the archaeology of this application, the CMA made contact with Facebook within two weeks of completion, that's on 29 May, and the initial enforcement order, the IEO, was imposed on 9 June.

In terms of timing, the CMA therefore has been reviewing the case for more than four months and we make the point in our skeleton that, for perspective, phase I should last a maximum of 40 days.

Given, however, that the phase I deadline has, formally speaking, not yet started, it does seem inevitable that the CMA's proceedings will extend into 2021 and quite possibly well into 2021.

So it is not unrealistic to expect that the global restrictions from which we seek partial derogations as imposed in the IEO could last for up to a year, and possibly even beyond. This is a significant period in the lifetime of two young companies such as Facebook and GIPHY.

The CMA, by contrast, has suggested that this investigation is in its relative infancy,

and it has also suggested that Facebook has been uncooperative. We find this suggestion very surprising. If I can go to Barbara Blank's first statement, please. It's in the first hearing bundle at C3, paragraph 10 on page 199.

THE CHAIRMAN: Just for your own purpose, what I am doing is for bundles A to E, I will be working from the hard copy. I think everything else I will be working off the screen. But it's useful to have it up on the screen as well.

MR O'DONOGHUE: Sir, I'm grateful. So it's page 199.

THE CHAIRMAN: Tell me which paragraph number.

MR O'DONOGHUE: Paragraph 10, Sir.

THE CHAIRMAN: Paragraph 10, yes.

MR O'DONOGHUE: So the Tribunal will see that there was a full voluntary merger notification, 90 pages, 38,000 words, plus 450 internal documents.

Then (b), responses to over 200 questions.

(c), in excess of 120,000 words of narrative responses in addition to documents.

(d), an ongoing e-discovery exercise which has thus far produced 8,500 documents, in addition to the 450 mentioned in (a) with the merger notification.

(e), we will see the total expenditure to date on external advisers and a very substantial time commitment on the part of internal advisers as well.

So the Tribunal will see that the figure of 6,500 hours, if we say for the sake of argument that a further 3,500 hours were spent by the internal personnel, that is a total of 10,000 hours so far on this transaction, and in broad terms that is about six years' full-time work for one individual.

The Tribunal will also have picked up from the first Del Rosario statement, paragraph 15, that at that stage, she estimated that Facebook's external lawyers had spent half of their time dealing with the IEO related issues.

So we completely reject the suggestion that we have not engaged. It is demonstrably untrue, and indeed we would respectfully submit that Facebook has already probably spent more time and more money than any company dealing with the IEO and derogations and engaging in the substance of the merger review.

So we make the simple point that the expenditure you have seen to date is something that one would expect to see in the context, perhaps, of a detailed phase II, not in the context of a case that hasn't yet even formally reached phase I.

So there has been substantial engagement on the part of Facebook and it is quite wrong for the CMA to suggest otherwise.

We have also had some huffing and puffing from the CMA on stopping the clock. That is completely irrelevant because the clock has restarted and continues to run. So this is at best a purely historic point that has no relevance whatsoever to this application.

THE CHAIRMAN: When did the clock restart, just remind me?

MR O'DONOGHUE: Well, Sir, it was stopped I think on two or three occasions --

THE CHAIRMAN: When is the last time it restarted?

MR O'DONOGHUE: I will give the exact date. I think, Sir, it was the second half of July but I may be corrected on that. Anyway, Sir, the critical point is that it has restarted and therefore complaining at some historic stage it was stopped is really neither here nor there, but anyway.

But it is one of a surprising number of pointless allegations made by the CMA in an effort to divert the Tribunal from the real issues in this case.

Now, can we start by looking at the IEO itself -- Sir, at the risk of complicating

matters further, you may have picked up that -- we submitted in the so-called miscellaneous bundle --

THE CHAIRMAN: I am working from that one now because I have put the other one in bundle I to one side because I see this one, it's slightly different but not materially different, but I am working from that one.

MR O'DONOGHUE: Sir, I'm very grateful. As I say, we were trying to be helpful.

THE CHAIRMAN: It is helpful, it's very helpful, of course it is.

MR O'DONOGHUE: We thought it was useful to effectively do a red line as to what would be amended or taken out and then one can see what's left.

So we hope to that extent it's useful.

So it's the miscellaneous hearing bundle, B1, and if we can start on the second page, paragraph 3, it says:

"... nothing in this Order shall oblige Facebook ... to reverse any act or omission, in each case to the extent that it occurred or was completed prior to the commencement date."

That relates to pre-IEO conduct, which obviously I will have to come back to, but we simply note here that at the time the IEO was imposed it didn't touch on pre-IEO conduct.

Then paragraph 4, which is obviously critical. Subject to a small change in 4(b), that would continue to exist in its present form.

This really is the critical provision in our submission, for the purposes of pre-emptive action, because it is the prohibition in question.

So (a) is integration, which the CMA complains about.

(b) is transfer of ownership.

(c) is an even broader clause which deals with the impairment of the ability of the

GIPHY business -- or Facebook business -- to compete independently in any of the markets affected by the transaction.

So that is put in strikingly broad terms, and in our submission offers the CMA a very broad level of protection, to the extent not included in (a) and (b).

Then turning to paragraph 5, (a) and (b) will --

THE CHAIRMAN: Let's go back to 4(b). You are challenging 4(b) because you are saying that Facebook business is a defined term which basically --

(audio interrupted)

-- and you are saying that this is very wide because ownership is, for example, shareholdings and controls, and if you are moving around shares or people are dealing in your own shares, that's a transfer of ownership, so you say that you need a derogation in respect of that.

MR O'DONOGHUE: Yes.

THE CHAIRMAN: But the problem that the CMA say, as I understand it, is to say, yes, we accept that the IEO is wide, but we need to engage with you and you need to give us more information so we can decide which aspects should be or which aspects should be outside, for example, this provision.

I think that's where the broad lines between you are. To me, certainly speaking for myself, this IEO does need revision. It may not be an all or nothing situation, ie you obviously want the carve-out derogation request granted in its entirety, but there may be some bits in here which we take the view that's far too wide and needs to be brought down into the scope; there may be others which we may take the view actually they seem quite reasonable at the moment; or there may be some where we say we just don't know in the absence of further information.

But I am right in thinking that your application isn't all or nothing?

MR O'DONOGHUE: Well, Sir, that's right. Obviously my primary position is that it is all the clauses we seek derogations in relation to, but in principle each one of them is subject to separate considerations and should be assessed on its own merits.

THE CHAIRMAN: We have looked at 4(b), okay. Take us to 5 then.

MR O'DONOGHUE: I will obviously come back on the information because it's essentially the only point the CMA really makes now, so I am not ducking that for a second, I will spend quite a bit of time today on that.

THE CHAIRMAN: Of course, yes, we will come to that later, I was just trying to understand where we are and where the battle lines are drawn.

MR O'DONOGHUE: Well, Sir, that's very useful, thank you.

Then on 5(a) and 5(b) are obviously important because in (a) there's an obligation to carry on GIPHY as a separate business, with the separate brand and identity and so on, and then (b), it has to be maintained as a going concern and it has to have sufficient resources to operate as a going concern.

In this context, there's been some grumbling about Facebook funding GIPHY, but we make the simple point that 5(b) requires that, it has to be funded to continue to operate as a going concern; that is a requirement.

As Alex Chung says in his second statement, paragraph 18, from his perspective, GIPHY's perspective, it is much more preferable, that's the word he uses, to having general funding from Facebook than having to go cap in hand into the market on each and every occasion, particularly during the Covid crisis.

So that's (b), that's the funding.

THE CHAIRMAN: Yes.

MR O'DONOGHUE: (c) is the first derogation we seek under paragraph 5. It concerns the organisational structure or management of responsibilities within GIPHY. And we wish to have the "Facebook business" deleted.

THE CHAIRMAN: On 5(c), the bit that goes up to the GIPHY business makes sense and we can all understand why that's in there. But there may be parts of the Facebook business which are particularly relevant to the dealings with GIPHY that should be covered on one view. I am not saying that that's necessarily the right view, and, to me, just looking at it, reading this and having read the papers in the case, it seems to me that the derogation request you're asking is quite a big derogation. There may be a derogation that's needed to carve out a significant part of the Facebook business, but there may be some people within Facebook that it's desirable to keep within the organisational structure unless you've got the prior written consent of the CMA.

So I am not saying -- I don't know whether the number of all your employees is confidential or not, but I am not saying that it's particularly relevant what happens to a large proportion of those people, but it may be relevant that certain people within Facebook are within this provision.

How do we deal with that, Mr O'Donoghue? How do we deal with that possible scenario?

MR O'DONOGHUE: Well, Sir, I'm going to develop that in some detail. I mean, it is effectively wrapped up in the point the CMA makes about information. So I will be coming to that later this afternoon in some detail. I mean, the point I would wish to make at this stage -- well, there are two points.

One is of course one cannot atomise 5(c). It has to be read in the context of, for example, paragraph 4 and 5(d), which I am about to come to. So to a certain

extent there is a linkage between the particular derogations we seek and what would be retained, so it's important not to read 5(c) in isolation.

THE CHAIRMAN: We have that. It's very important because I think what you say is, look, we have to bear in mind the aspects in this notice which are not subject to any derogation request; the fact that there's a monitoring trustee and there's an HSM as well, and that we should bear all that in mind, whether you are looking at the individual bits that you want changed.

Yes, I have got that point, yes.

MR O'DONOGHUE: Yes. But we do emphasise that at base, under paragraph 4, there is a clear and powerful obligation in place, and as you say, Sir, heavily monitored both by the monitoring trustee, which is now on its fifth or sixth report, and the hold separate manager. So it is a composite point to that extent, but I do have to go through each of the derogations individually.

But --

THE CHAIRMAN: That is what I want you to do, yes, that's fine.

MR O'DONOGHUE: So I am not ducking that point, I will come back to it.

Then (d), the Tribunal will see the amendments which are proposed there. So there is the procurement of GIFs and stickers on the Facebook side that would be maintained. And we have made the point in our skeleton and elsewhere that effectively that means globally because one cannot disentangle a seamless global service into a UK/non-UK component.

So what one could almost argue, that this is something of an upgrade for the CMA because effectively this will be applied on a global basis, even if expressed in the first instance as being applicable to the UK.

THE CHAIRMAN: Can I just ask you sort of two questions on (d).

Let's say there's a product, okay. If they amend a product -- when I mean they, I mean you --is that potentially caught by (d)?

MR O'DONOGHUE: Yes.

THE CHAIRMAN: And that if you introduce a new product, then it could be said, well, that falls within range?

MR O'DONOGHUE: Yes, I mean for want of a better phrase, what (d) does is it freezes our activities in connection with the procurement of supply of GIFs, so it would relate both to a modification and to a new product.

THE CHAIRMAN: Yes, but if you look at (d) -- forget your amendments for now, I am just trying to figure out what the clause means for the moment. If there's a product that Facebook have and that product is amended, it's not a GIPHY product, is that going to be caught by that?

MR O'DONOGHUE: Sir, yes, insofar as it concerns the procurement of supply of GIFs, it will be, yes.

THE CHAIRMAN: Yes. Surely a lot of your products have -- I've got WhatsApp on my phone, okay, and on my WhatsApp there's a couple of buttons you can press and you have access to the GIF library. So if you change WhatsApp, is that something that's caught?

MR O'DONOGHUE: Well, in relation to procurement of supply of GIFs, yes.

THE CHAIRMAN: Yes, okay. It's not particularly fair because if the GIFs are being supplied on the WhatsApp platform or whatever you want to call it, changing the WhatsApp platform, is that going to fall within the clause or are you saying it doesn't, or you just don't know?

MR O'DONOGHUE: Well, it has to concern in the first instance something which is the procurement or supply of GIFs, as opposed to the procurement or supply

of social media services or communication services.

THE CHAIRMAN: Okay. Carry on.

MR O'DONOGHUE: Sir, we do say that paragraph 5(d) in this form is also a very significant concession to the CMA because the combination of paragraph 4 and 5(d), in particular, amounts to a significant form of protection on the CMA side. I will come to back to that but that's the basic --

THE CHAIRMAN: But will you look at the original wording of (d). The original wording is:

"The nature, description, range and quality of goods and/or services supplied in the UK by each of the two businesses are maintained and preserved."

But then the two businesses -- your business isn't confined to GIPHY products, is it? You want it to be amended to confine, effectively, to GIPHY products, okay, but under the current wording of (d), if you want to amend one of your products or introduce a new product, even if it's not related to GIPHY, is that caught?

MR O'DONOGHUE: Well, Sir, on the face of it, yes, which is exactly why we say this is manifestly too broad and we propose to amend it in the way we have.

THE CHAIRMAN: Can you tell me what's going on on the ground then? Let's say you are introducing a new product or you are changing the quality of a product. What's happening? Are you telling the CMA or are you just not introducing them for now or what? What's happening on the ground?

MR O'DONOGHUE: Well, Sir, we are obviously in a difficult position in that we have made these qualified compliance statements, so what I am not going to say and what I cannot say is, oh, yes, by the way we are in breach. I mean, the point I would make at this stage -- I will come to this in some detail --

THE CHAIRMAN: No, but you are saying it's causing you a lot of problems in practice. If you're following it, I can understand you saying "We have problems in practice". If you are not following it, then that argument isn't so strong about how problematic it is at the moment in practice. I just wanted to know for my own purposes -- if you can't answer, then don't answer -- I just wanted to know what's happening on the ground.

MR O'DONOGHUE: Sir, what's at least fair to say is that when one is considering any change to the business falling within 5(d) in its current form, you are at least on the horns of a dilemma.

THE CHAIRMAN: Yes, I can see that.

MR O'DONOGHUE: I will come to this but the downside of getting that wrong is not a trivial thing: the sanction 5 per cent of worldwide turnover and/or perhaps even a period of imprisonment.

I will come back to that, Sir, but on the face of it this is a substantial restriction and the consequences of not complying are equally substantial.

THE CHAIRMAN: Because this one doesn't have "except in the ordinary course of business" at the beginning?

MR O'DONOGHUE: No, it doesn't. It seems to cover everything, which is clearly too broad.

Sir, as I indicated, although originally it was expressed to apply to supply in the United Kingdom, for practical purposes within Facebook that means globally because one cannot disaggregate the services into UK and non-UK hermetically sealed services.

So it is very important.

THE CHAIRMAN: When I looked at the IEO and read all your evidence, of course

I have a great deal of sympathy for the view that derogations are needed in the light of some of the points that you are making. But how do we get there? You know, when we had the CMC I had the vain hope that by ordering the Scott schedule, that something would happen and that there would be dialogue between Facebook and the CMA. Because clearly something has gone wrong here, that we are in a situation whereby you are before the Tribunal, you don't want to be before the Tribunal unless you have to, and these applications take up a lot of time and resources of both parties, which could have been used in trying to iron out the points that are clear to me, at least, that something needs to be amended on this.

MR O'DONOGHUE: Sir, yes. Well, Sir, I mean --

THE CHAIRMAN: We need to go through all these clauses so the Tribunal can have a clear view of where the battle lines are drawn and what the problems are and what you say the solutions are.

MR O'DONOGHUE: Well, Sir, yes, but just to give you the punchline, what we will be saying in a nutshell is if one looks at what is retained in the version of the IEO before you, the totality of that version of the IEO, and in particular the combination of paragraph 4 and what is retained in paragraph 5, both for GIPHY and for Facebook, is more than ample protection against any risk of pre-emptive action, and we say therefore that the request we have applied for should be granted in full.

So that's essentially our position.

THE CHAIRMAN: Okay, but there are a number of scenarios as to how this can play out.

One scenario is we reject all your arguments and say effectively that's the end of it.

Another scenario is we accept your arguments and give a direction to the CMA to do whatever is necessary and to progress the granting of the derogations.

But there may be another halfway house, which is that we say that, looking at the wording of the IEO, clearly it is too broad for a business of the size and complexity of Facebook in certain respects and that the parties should sit down and work out a way forward.

Because some of these provisions here, I myself don't have enough information to necessarily understand the full ramifications of what's being proposed and what qualifications may be needed.

As you know, with these derogations sometimes there's a bit of give and take between the merging parties and the regulator and it's not simply a question of putting a red line through something. It may be having an understanding -- for example, when we come to the key employees point -- of what's involved and coming up with a formula that both sides can live with.

Those are the three scenarios --

MR O'DONOGHUE: I see that.

THE CHAIRMAN: I do have sympathy with Facebook in the sense that this is too broad for a business the size and complexity of Facebook. But I have sympathy for the CMA, which is they are saying: we need further information and dialogue with you in order to get to the position whereby we can grant derogations in a situation where we could be confident that those derogations are appropriate and we have sufficient protection within the meaning of section 72.

So I am just saying that's where we are. Mr O'Donoghue, I'm slowing you down but I think it's helpful at the beginning for you to understand what's going on in my

mind, having looked at the papers a couple of times.

MR O'DONOGHUE: Well, Sir, I'm extremely grateful. I mean, I suspect as we go through some of the points of principle and points of detail that it will crystallise.

THE CHAIRMAN: That's good. We have done (d). Let's move on.

MR O'DONOGHUE: Yes. (e) is in a sense more straightforward because it concerns the question of assets.

Then (f) obviously would be retained, so there would be no integration of IT between the businesses, which is obviously important.

(g) will also obviously be retained and, again, it's important; the customer and the supply lists of the two businesses will be operated separately.

Then (h) will also be retained. It concerns all existing contracts of the GIPHY business and the Facebook business to be serviced by the business to which they were awarded. So, again, this goes to the question of separateness.

Then (i) and (k) are two derogations we do seek in relation to key staff --

THE CHAIRMAN: On (i), I have obviously seen the figures that you put forward. Is that confidential or not confidential?

MR O'DONOGHUE: Sir, it is confidential, yes. I think what we can say is perhaps a five-figure sum. But the actual figure, yes, is confidential.

THE CHAIRMAN: Okay. Because the number of key staff on your interpretation of this clause -- I am not saying it's right or wrong -- is large.

MR O'DONOGHUE: Yes.

THE CHAIRMAN: When you look at (k), if that continues to include the Facebook business, it would mean that all the key staff across the subsidiaries, the various subsidiaries, let's say their job protection is greater than would

otherwise be the case.

MR O'DONOGHUE: Indeed. And of course a number of these are employed under local employment laws, which could raise other issues as well.

THE CHAIRMAN: Can you help me: how have you defined "key staff"? Did you deal with that -- I think you did deal with it in your witness statements, how you get to your figures and how you decide who is key staff and who isn't key staff. Can you just take me to that reference?

MR O'DONOGHUE: Yes. It's essentially a managerial role. Let me just give the Tribunal the reference. It's Del Rosario 1.

THE CHAIRMAN: Let me have a look at that.

MR O'DONOGHUE: 12(e), Sir.

THE CHAIRMAN: C tab, which one?

MR O'DONOGHUE: C, tab 2, page 193.

THE CHAIRMAN: The paragraph number again?

MR O'DONOGHUE: It's 12(e).

THE CHAIRMAN: Okay, let me just have a quick look at that.

MR O'DONOGHUE: And also 10(d).

MR FRAZER: What was the bundle page number? The electronic bundle page number?

MR O'DONOGHUE: It's 193 and 190. Footnote 7.

THE CHAIRMAN: Yes, okay, I'll flag that. Yes, okay, thank you very much.

Okay, so that's (i) and (k), 5(i) and 5(k).

MR O'DONOGHUE: Then (l) is also important. It concerns confidential information.

THE CHAIRMAN: Yes.

MR O'DONOGHUE: And then paragraph 6 -- obviously the IEO applies globally to

Facebook.

Then 7 you will see the compliance reporting. So the Tribunal will see that the first report was due on 23 June.

THE CHAIRMAN: Yes.

MR O'DONOGHUE: So the IEO itself is dated 9 June.

On 10 June, Facebook made a series of urgent derogation requests, if we can quickly turn to those. It's in the first bundle, tab F7. It's page 364.

THE CHAIRMAN: If I go on the agreed chronology, that may be easier for me.

MR O'DONOGHUE: 10 June --

THE CHAIRMAN: Yes, I have that now.

MR O'DONOGHUE: -- letter from Facebook headed "Richard, Anna".

THE CHAIRMAN: That's it, yes.

MR O'DONOGHUE: You will see at the top, about four lines down, "urgent derogation requests". If you flick on a couple of pages, you will see that they include, on 367, a number of the requests we are dealing with now.

THE CHAIRMAN: Yes.

MR O'DONOGHUE: Then you will see a chasing letter from Facebook on 22 June, which is in tab 16, 401.

THE CHAIRMAN: Yes.

MR O'DONOGHUE: You will see in the first paragraph:

"... can you let us know the status of that request?"

Then the last paragraph:

"We will need to update Facebook today as a matter of urgency in light of the first compliance statement falling due tomorrow and since the CMA was not minded to accept Facebook's request for the deadline to be extended until

such time as the derogation requests had been formally decided ..."

THE CHAIRMAN: You say you were faced with a difficult situation, because you say the IEO requirements are too broad and not practicable for you to comply with, certainly in certain respects, and you have this deadline coming up the next day.

MR O'DONOGHUE: Well, Sir, yes, it's worse than that. The IEO comes in on the 9th, it has to be applied globally, on the very broad basis we've seen. On the 10th we had put in derogation requests. On the day before the first compliance report was due we still hadn't had a response from the CMA. These were urgent derogations.

So I mean at that stage the CMA knew two things: it knew that it was practically impossible to comply with this in the period they had indicated, and we had urgent derogations which were outstanding, and on which the day before compliance they hadn't expressed any view.

THE CHAIRMAN: I presume that, with your compliance statements even now, you are making the same caveats, are you, as before?

MR O'DONOGHUE: Sir, yes, we have to.

Essentially, the vista faced by Facebook was: well, this is our standard template, you need to fully comply, and if you don't, we'll fine you.

And they tell us all of this the day before the first compliance report was due.

THE CHAIRMAN: Shall we just look at that then?

MR O'DONOGHUE: It's the next tab, at page 402.

THE CHAIRMAN: For you to know, I'm working from the hyperlink chronology, all right?

MR O'DONOGHUE: Sir, yes.

THE CHAIRMAN: When it comes to writing a ruling on this, I'll be working from the hyperlinked chronology because it's so easy to find everything and it's all in date order.

MR O'DONOGHUE: Sir, yes, I will endeavour to give you those references.

We certainly say at the outset that this was a reasonable approach and a reasonable authority would have given a global company like Facebook a proper period of time to comply.

THE CHAIRMAN: Yes, but the problem is you are saying even if they had given you three months, you are still saying it's not practicable to comply with because you are still issuing the same caveats today.

MR O'DONOGHUE: Sir, as it turns out, yes, that's correct, but certainly in the first couple of weeks it was manifestly unreasonable, while derogation requests were pending, to say that the compliance report had to be produced on the 23rd.

THE CHAIRMAN: Yes.

MR O'DONOGHUE: So just to wrap up on the IEO -- Sir, for your reference, the letter threatening sanctions is 7 July, and that's in the supplemental bundle at 572.

THE CHAIRMAN: Is it not hyperlinked on the chronology?

MR O'DONOGHUE: It is, Sir, yes.

THE CHAIRMAN: Say that again. Where is it in the chronology?

MR O'DONOGHUE: 9 July, Sir.

THE CHAIRMAN: 9 July, okay, let's look at that.

MR O'DONOGHUE: 572.

THE CHAIRMAN: Yes. Okay, I've got that, thank you.

MR O'DONOGHUE: Sir, just to wrap up on the IEO, then we have -- so that's paragraph 7. Moving on to paragraph 8, there's a duty on both parties to keep the CMA informed of any material developments, including but not limited to -- then you see (a), (b), (c) and (d). Then you will see at the end of (d) the amendment we put forward in the derogations.

Then 9, an important provision: if there is any reason to suspect breach, the CMA should be immediately notified and any monitoring trustee as well.

THE CHAIRMAN: Yes.

MR O'DONOGHUE: So, Sir, those are the provisions of the IEO that would be retained or amended on the basis of this application.

So, Sir, turning to the application itself, we say that in essence the application is straightforward. Facebook and GIPHY have committed under paragraph 4 of the IEO not to do anything which would affect the CMA's remedial powers, including notably the integration and independent running of GIPHY.

We say the basic obligation could not be clearer.

All of paragraph 5 of the IEO would continue to apply to GIPHY in full, and in particular paragraphs 5(a) and 5(b), which we have seen, which require the separate running of GIPHY as a going concern independently with sufficient resources.

On the Facebook side, Facebook would continue to be bound by paragraph 5(d), as we have just seen, and all other parts of paragraph 5 falling outside the carve-out derogation requests we have made.

In that context, and, Sir, this picks up a point I think you averted to, Facebook will have to self-assess, on pain of severe criminal and penalty sanctions, compliance with the IEO, and the CMA is considerably assisted by the

monitoring trustee and hold separate manager, who would be quick to point out to the CMA any apparent non-compliance.

The Tribunal has two of the monitoring trustee reports in the bundle and if we can quickly look at these just to see what we are dealing with. It's in hearing bundle 3, tabs 41 and 42.

So these are confidential but I don't intend to read them out.

I mean, I would make a small handful of points.

First of all, Sir, as you can see, these are very lengthy substantial documents, they are 60 to 70 pages each. The author of the reports is Grant Thornton, which is one of the best known accountancy firms in Europe, if not worldwide.

THE CHAIRMAN: I am sure they will be very pleased to hear that.

MR O'DONOGHUE: They are certainly well known, Sir. I didn't intend to butter them up that much, but they are certainly well known!

The Tribunal will also be aware that Alex Magnin, he is the HSM and he's a former GIPHY head of revenue, so in terms of what I would call policing, the CMA is extremely well positioned.

Facebook isn't seeking a derogation that enables it to run any parts of GIPHY's business; it is seeking freedom to operate its own business, leaving GIPHY intact.

We do say that the protections in the IEO which would remain intact, both on the GIPHY side and on the Facebook side, are plainly adequate to address any rational concern the CMA might have in respect of remedies. Together, they ensure that GIPHY is held and run separately with the resources it needs to be maintained as a going concern and, if needed, the GIPHY business can be divested in full, which would restore the status quo ante.

We do emphasise that if these requests are granted, Facebook would still be subject to very strict obligations in relation to GIPHY. If, for example -- I think, Sir, this picks up on a point that you averted to -- it tried to sack GIPHY's management without the CMA's consent, that would clearly be a breach of paragraphs 4, 4(c) in particular, 5(a) and 5(b) and 5(i) of the IEO, none of which is affected by the carve-out derogation requests we seek.

We say the CMA has all the protections it reasonably needs at this stage and, by contrast, if the IEO is maintained in its current form, paragraphs 5(c), (d), (e), (i) and (k), are imposing enormous and unjustified constraint on the Facebook side.

The Tribunal obviously has this point, but Facebook is a large complex, dynamic and innovative organisation. Having to seek individual derogations from the CMA for, say, every change in management, asset disposals or, most crucially, products or services is completely and utterly unrealistic.

We are talking about hundreds of subsidiaries, tens of thousands of employees and the confidential management figure that the Tribunal has just seen.

Now, just to tease us out in a bit more detail, Facebook has an office in Taguig in the Philippines. I had never heard of this city before this case, and why on earth is it any of the CMA's business who Facebook hires or fires there.

I come from Cork, where Facebook also has an office. Why does the CMA have to give a permission slip for hiring some guy in Cork?

We then, as the Tribunal will have picked up from the skeleton evidence, had the shenanigan whereby the CMA said the rehiring of Chris Cox as the chief product officer was a breach of the IEO. That was a view which was maintained for months before the CMA finally accepted that it arose pre-IEO,

and but for this the CMA would have required a derogation for rehiring Mr Cox. We say, why on earth should that be so?

There are other clear examples. Without the CMA's prior written consent, the IEO in its current form prevents Facebook and each of its subsidiaries from engaging in the sale of assets in the United States, Australia or India, entering into debt finance agreements concerning security over any of their assets in, say, South Africa or Israel, terminating a lease in Singapore, being a disposal of assets, or transferring intellectual property.

Just to give the Tribunal a flavour of how routine these transactions are for an organisation such as Facebook, if we go to Del Rosario 2, which is in C5 of the hearing bundle --

THE CHAIRMAN: Are we not going to look at the monitoring trustee reports?

MR O'DONOGHUE: I will come to that in about five or ten minutes.

THE CHAIRMAN: That's fine.

MR O'DONOGHUE: I want to look briefly at the HSM report. On the monitoring trustee report, you have two reports. I didn't want to take up time going through them line by line --

THE CHAIRMAN: I have read every page if that gives you any comfort.

MR O'DONOGHUE: I have too, if it's any consolidation. We make the simple point that this is an extraordinarily detailed exercise by a serious accountancy firm and that provides significant support to any ongoing concerns the CMA may have. I mean effectively the monitoring trustee and HSM, they have two policemen who can assist them in the task of monitoring compliance.

THE CHAIRMAN: Do we have any reports from the HSM in the bundle? I can't remember now, I don't remember seeing any.

MR O'DONOGHUE: Sir, there is one which I will take you to in a few minutes.

MR FRAZER: Mr O'Donoghue, sorry to interrupt you. Before we lose the point -- because you were talking about the hypothetical appointments of people in Cork and Indonesia and why would that be any of the CMA's business. You did mention Facebook being a global firm with disparate management. What would you say if the appointments in Cork or in Indonesia were in relation to Facebook's activities in GIFs, for example? That would surely be of interest to the CMA, in your view.

MR O'DONOGHUE: That's why I've laid considerable emphasis on paragraphs 4 and 5(d) in particular, because that is a set of circumstances which would remain within the IEO in that scenario.

MR FRAZER: Would it, though, because the changes you have sought to make to 5(e) is that no changes are made to key staff of the GIPHY business but entirely excluded in the Facebook business. I wanted to see what would happen if the key staff that were to change in the Facebook business had some connection with GIPHY's activities.

MR O'DONOGHUE: Sorry, Sir, I missed that.

MR FRAZER: I apologise. In 5(i), which you have taken us through, you have sought to exclude entirely from 5(i) any changes of key staff made to the Facebook business on the basis that, say, an appointment in Cork or Indonesia would be of no interest to the CMA. I am just asking you to comment on the possibility that those two appointments might be made by Facebook in relation to a business connected with the supply or procurement of GIFs, for example.

MR O'DONOGHUE: Well, Sir, then I had understood your question correctly.

My answer is if it had any relevance to GIPHY then there would be a breach of paragraph 4, or in particular paragraph 4(c).

So that's the point we keep coming back to, which is the CMA has GIPHY-related protections in paragraph 4, and that, with the combination of paragraph 5(d), is more than adequate, in our submission.

MR FRAZER: In 5(c) -- you have just taken me, sorry, to 5(c) --

MR O'DONOGHUE: 4(c).

MR FRAZER: 4(c), I do apologise. 4(c) is about ability independently to compete. My question was in relation to an appointment of key staff in Facebook, which is excluded from the IEO in your version, in relation to appointment of key staff in Facebook, would it be of interest if that key appointment was in relation to a business to do with the procurement or supply of GIFs? So not of the GIPHY business, but the procurement or the supply of GIFs within Facebook?

MR O'DONOGHUE: Well, Sir, that is then 5(d). We have agreed on the Facebook side to effectively freeze the procurement and supply of GIFs --

MR FRAZER: No, I don't think so. With respect, that's about the range, quality and nature of goods, not in relation to the appointment of key staff.

MR O'DONOGHUE: Yes, but our point nonetheless remains good, which is that with that freezing in place, that is more than adequate protection for the CMA.

MR FRAZER: I see. Thank you.

MR O'DONOGHUE: Going back to the question of asset disposal, if we can quickly turn to Del Rosario 2, please. It's in C5, page 221.

It's the bottom of the page where it starts, for example.

THE CHAIRMAN: What paragraph number?

MR O'DONOGHUE: 16(c).

THE CHAIRMAN: Okay.

MR O'DONOGHUE: You will see the reference there to a substantial number of patent assets. I think the figure is confidential but the Tribunal can see it.

Then in relation to copyright registrations, there is a further figure in the order of thousands.

So we are literally talking about potentially hundreds of individual derogations. We do make the point in this context, if you go to paragraph 17 of the same statement, please --

THE CHAIRMAN: As I understand it from what you were saying before is that when you have one of those situations, you are not currently writing to the CMA saying, "We need an individual derogation in respect of this"?

MR O'DONOGHUE: Correct.

THE CHAIRMAN: Yes, okay.

MR O'DONOGHUE: On pain, of course, of potential breach.

THE CHAIRMAN: Well, you have a choice, don't you? You either freeze, in which case there's no potential sanction; or you notify the CMA and get their consent, but you say that takes too long and is impracticable; or you go ahead without seeking a derogation, which puts you at risk of a breach.

MR O'DONOGHUE: Yes. None of which is particularly appetising.

On the question of delay, Sir, if we can quickly look at 17 of Del Rosario 2. So she notes it took four weeks to obtain a basic derogation in relation to HR services. And then at the bottom of the page, it took the CMA eight weeks to consider and then deny the on-boarding of two GIPHY employees to Facebook. Then an additional four weeks to deny the on-boarding of a third

employee, and so on.

So we do make the point that it is obvious that this process of going through mini derogation applications in relation to assets and employees on the scale we are dealing with is completely and utterly unrealistic and it does rather suggest, if this is the litmus test, the CMA is somewhat out of control and has lost sight of basic common sense and has departed the real world.

THE CHAIRMAN: I am not sure that's fair to say because, look, what they're saying is they will consider your carve-out requests if you provide information so we can make an informed decision in relation to your request, whether to grant it, refuse it or to grant it in part, and they are saying unless you come up with that information, it's very difficult. And they note that you're not challenging in itself the original IEO, your challenge is their refusal to grant derogation.

Because their system seems to be where you have non-notified mergers, there's an information asymmetry, they have to act quickly, and they have a template which they usually will apply -- they may modify it if they have enough information to modify it -- they put it in place and then what makes it compliant with the proportionality requirements, which they themselves accept they have in the interim guidance, is how they deal with derogation requests. So they expect the merging parties to come back to them to give them the information that they can deal with.

So it's hard to criticise, sitting here, the CMA for asking for further information so they can make an informed decision. On the other hand, it's hard not to sympathise for Facebook for the situation it's got for the reasons that you've explained.

MR O'DONOGHUE: Sir, yes, I will come to the information which, in our

submission, is a red herring in context.

The basic practical point I am making at this stage is really a commercial point, that when you have seen the number of patents, the number of employees, the number of managers and the number of copyrights we are dealing with, tens of thousands, the suggestion of going along on a drip-feed basis for each mini application where the review period is of the order of four to eight weeks is for the birds.

It is obviously impractical.

THE CHAIRMAN: Yes, it's impractical is a more neutral way of putting it, yes.

MR O'DONOGHUE: Well, Sir, yes. We would say it's hopeless but it's at least impractical.

THE CHAIRMAN: You say we just have to look at how long the others have taken to sort out, yes.

MR O'DONOGHUE: Well indeed, two or three employees, eight weeks.

Now, we also make the point that it's not simply a question of hassle or practicalities -- but it is that too -- there is also, of course, a risk that innovation could be stifled to some extent.

THE CHAIRMAN: Well, that's if you're complying with it, but you're saying that you're not going through this process. You've gone for scenario 3, which is you're doing the change, carrying on business, without seeking a derogation.

MR O'DONOGHUE: Yes, Sir, on pain of the sanctions we have just seen.

THE CHAIRMAN: Is that a prudent thing to do?

MR O'DONOGHUE: Well, Sir, we are on the horns of a dilemma, there are no good options, if I can put it like that.

THE CHAIRMAN: I can see that when you look at the three options, you freeze your

business, which you say you have a dynamic business and it's really difficult to and you have so many subsidiaries and you have so many patents and copyrights and you are developing your products, you're saying you are not going to do that.

Then you are going to say, well, seeking individual derogation, well, we tried that in respect of certain things and it's just too time consuming, and given the number of potential transactions which would be caught, it's just not going to work.

Then the third one is the one that you say, well, we have our interpretation and we will just carry on as before, but then you have that risk.

MR O'DONOGHUE: Yes.

THE CHAIRMAN: None of those are very attractive, to be honest.

MR O'DONOGHUE: No, no. So you put it neutrally that it's a function of the CMA's decision to apply the standard template that it does, at least in the case of completed mergers.

THE CHAIRMAN: Yes, we understand why they do that, yes.

MR O'DONOGHUE: Yes. But equally, in my respectful submission, one should also understand why the focus then needs to shift very quickly to the question of derogations being engaged with.

THE CHAIRMAN: Absolutely, I think you will find we agree with that. I think there's no difficulty in anyone accepting that proposition. Unless Ms Demetriou says I've got that one wrong.

MR O'DONOGHUE: Sorry, I see her shaking her head.

THE CHAIRMAN: No, she agrees, unless -- I think she's nodding rather than shaking.

MR O'DONOGHUE: Well, she was shaking to indicate she didn't disagree with your question, yes. I think we have some common ground on that.

Now, on the question of compliance, it is obviously common ground that some integration steps took place pre-IEO and it is also common ground that that was entirely lawful under the voluntary regime.

It is also common ground the CMA has taken no steps to unwind the pre-IEO integration despite having clear legal powers to do so, which I will come back to.

Now, the CMA's defence at paragraph 25 sets out an ambiguous position --

THE CHAIRMAN: Let's have a look at that then. Yes?

MR O'DONOGHUE: So they are alluding to the possibility --

THE CHAIRMAN: So they are not criticising you for the integration steps you took prior to the commencement of their investigation and the interim measures.

MR O'DONOGHUE: Sir, no. But in the brackets, there is some allusion to post-IEO integration, or at least they are reserving their position.

THE CHAIRMAN: You would expect them to say that. The reality is that they are not asking you to unwind at this stage the steps you have taken.

Look, when you merge, you merge, you know, that's what it's about, and so I would be very surprised if there had been no integration within three weeks of a merger having been completed in the circumstances. So I don't think anyone is criticising Facebook or GIPHY for the steps they've taken prior to the imposition of the interim measures.

But I think what the CMA are saying is that, given the extent of the integration, it's all the more important for them to be very careful in it granting derogation requests. You may not accept the logic but I think that's what they are saying.

MR O'DONOGHUE: I will come back to that, and I also reiterate the point I made earlier, which is we do not accept the CMA has jurisdiction, and that is an issue which remains at large, which may be for another day.

THE CHAIRMAN: It's certainly not for today.

MR O'DONOGHUE: No, we have enough in our pocket.

The point I want to clarify immediately at this stage is, yes, there was some lawful pre-IEO integration, which I will come back to, but there is no suggestion whatsoever that there has been any post-IEO integration, and it is important to clarify that as well.

If I can just give the Tribunal a couple of references.

There's our letter of 23 June, which is at page 403 --

THE CHAIRMAN: On 23 June, I have items 19 and 20. There's a call and then there's the first compliance statement.

MR O'DONOGHUE: Sir, yes, it's that.

THE CHAIRMAN: The second one, is it? Yes, okay.

MR O'DONOGHUE: Sir, yes.

THE CHAIRMAN: Yes, I've got that now, yes.

MR O'DONOGHUE: Then at page 404, which is --

THE CHAIRMAN: The numbering is different when you get the documents up on the agreed hyperlink chronology.

Page 2, yes.

MR O'DONOGHUE: It says all integration steps were immediately paused.

THE CHAIRMAN: Yes, of course they were, yes.

MR O'DONOGHUE: Yes. Then, in the same bundle, Del Rosario 2, paragraphs 7 and 8, page 217. Tab 5, paragraphs 7 and 8. So she confirms, as the

signatory of the compliance statements, no integration between Facebook and GIPHY has taken place post-IEO. Then at 8, Sir, there's a reference to the monitoring trustee report.

THE CHAIRMAN: No one is alleging that there has been any.

MR O'DONOGHUE: No, Sir, but there's some ambiguity in paragraph 25 of the defence. I just wanted to make crystal clear that from our perspective there has been none.

THE CHAIRMAN: Yes, okay. I think they are just reserving their position, I don't think they're making a fundamental point here.

MR O'DONOGHUE: Yes, I just wanted to clarify where we stand.

THE CHAIRMAN: No, you are right to put your own flag up but I think it's understood there are some battle lines here.

MR O'DONOGHUE: Yes. Then you asked earlier about -- I think you mentioned the monitoring trustee reports. Can we quickly look at one of the recent HSM compliance reports.

THE CHAIRMAN: Yes, I haven't looked at that, I don't think, so where is the HSM one?

MR O'DONOGHUE: Yes, it's at 1649, which is in hearing bundle 2. Sir, this is confidential so I won't be reading it out.

THE CHAIRMAN: Hearing bundle 2. Which tab?

MR O'DONOGHUE: It's an exhibit-tab, tab 4.

THE CHAIRMAN: Yes.

MR O'DONOGHUE: So it's Alex Chung's second statement, tab 4. It's also in the chronology, Sir.

THE CHAIRMAN: What, this report? Then I will work from that, sorry. Okay, so

where is it in the chronology? Give me the date and then I will find it.

MR O'DONOGHUE: Row 52, Sir, 29 September.

THE CHAIRMAN: Okay, let me just quickly look at this.

(Pause)

MR O'DONOGHUE: Sir, it's paragraph 2 in particular.

THE CHAIRMAN: But then if I look at that, is that basically following your revised derogation wording? Because, for example, it says 2(a)(ii):

"Transfer the ownership or control of the GIPHY business or any of its subsidiaries."

MR O'DONOGHUE: Well, this is a compliance -- on the GIPHY side --

THE CHAIRMAN: Yes. From the GIPHY side, there's no doubt from reading this -- I don't think I've read this one before, but there's no doubt from this that GIPHY has done it.

From the Facebook side, we have your compliance statements which are caveated, in effect, to take out the derogations?

MR O'DONOGHUE: Well, Sir, they are caveated.

THE CHAIRMAN: Yes.

MR O'DONOGHUE: I wouldn't go as far as to say --

THE CHAIRMAN: But this isn't --

MR O'DONOGHUE: -- take out the derogations, but we are now looking at the GIPHY side.

THE CHAIRMAN: Exactly, and from the GIPHY side you are saying there's no problem and ... yes.

MR O'DONOGHUE: No. It is fair to point out this report obviously covers, you see in paragraph 1, the first half of September, but this is one of a number of reports and all of the GIPHY compliance statements since 23 June have

essentially said something similar.

THE CHAIRMAN: I presume you say it's not that burdensome for an organisation with the type of product and the size of GIPHY to do that, but it's completely different when you're talking about a dynamic business cutting across so many different companies and jurisdictions and products as your client?

MR O'DONOGHUE: Yes, Sir. I mean, they essentially do one thing.

THE CHAIRMAN: Yes. Okay, we've got that.

MR O'DONOGHUE: So just to round off on integration, the Tribunal of course will be aware that in section 72(3B) of the 2002 Act there is a power to require unwinding of integration.

The power can be exercised both on an interim basis and in relation to a final remedy.

If we can just pick up the CMA's guidance on this point, it's actually in the authorities bundle. It's in my authorities 5, tab 78 -- this is the 2019 interim measures --

THE CHAIRMAN: Which tab in the bundle, electronic bundle, is this?

MR O'DONOGHUE: It's 78.

THE CHAIRMAN: Okay.

MR O'DONOGHUE: It's page 4353 at 3.21.

THE CHAIRMAN: Yes. I've taken my copy out because I've annotated it. Which paragraph?

MR O'DONOGHUE: 3.21, Sir. It says:

"The CMA has the power to issue an Unwinding Order to require integration to be unwound if it judges it necessary to preserve the CMA's ability to pursue its investigation and/or to implement effective remedies."

So there clearly is an interim unwinding power in respect of pre-IEO or even

post-IEO integration, and the CMA's own guidance says if the CMA feels it needs to preserve its remedial options, that is a power that could or should be exercised, and we make the simple point that has not been done or even been suggested in relation to the integration it complains of in this case.

THE CHAIRMAN: Yes.

MR O'DONOGHUE: Sir, a couple of final points by way of background before I go into the detailed submissions in the grounds in more detail.

THE CHAIRMAN: We will have a break in a minute.

MR O'DONOGHUE: Sir, yes, this will take no more than five minutes.

THE CHAIRMAN: Let's do this point and then we will have a break.

MR O'DONOGHUE: Yes. So it's just to pick up on the 2002 Act, particularly section 72. That's in authorities 1, tab 3.

THE CHAIRMAN: What section do you want to look at?

MR O'DONOGHUE: 72, Sir.

THE CHAIRMAN: What page is that?

MR O'DONOGHUE: It's 102. This is in the skeleton, Sir, I can take it pretty rapidly. It's 72(2).

THE CHAIRMAN: Yes.

MR O'DONOGHUE: Then at (3C) and (6). And then (7) is important:

"The CMA shall, as soon as reasonably practicable, consider any representations received by it in relation to varying or revoking an order under this section."

So there is a statutory requirement on the CMA to act with some degree of speed, or reasonable practicability.

And then (8) obviously is important, the definition of pre-emptive action.

THE CHAIRMAN: Yes, and both sides look at that, yes.

MR O'DONOGHUE: Yes. We will come back to this, but obviously what it doesn't say is pre-emptive action is defined on the basis of overlaps. It links pre-emptive action to essentially remedial action.

THE CHAIRMAN: And both sides accept what we said in ICE Trayport at 220 on that.

MR O'DONOGHUE: Sir, yes, yes.

THE CHAIRMAN: Yes.

MR O'DONOGHUE: Then finally, Sir, on the sanctions, there's section 117.

THE CHAIRMAN: What page is that?

MR O'DONOGHUE: Sir, 166.

THE CHAIRMAN: Yes.

MR O'DONOGHUE: You will see at the end there's even a period of imprisonment, not exceeding two years, or a fine.

Then, section --

THE CHAIRMAN: That's false or misleading information, yes.

MR O'DONOGHUE: Yes, that's obviously something specific. Then 94A is the basic power to fine.

THE CHAIRMAN: The thing is, if you give a compliance statement which doesn't provide all the information sought, it may be a breach -- is it 109?

MR O'DONOGHUE: Well, Sir, it's 117 -- 94A is the basic power to impose a fine.

THE CHAIRMAN: Oh, yes. Can we just go back to 109.

MR FRAZER: I think there's actually nothing falls (inaudible), possibly.

MR O'DONOGHUE: Yes, that's in relation to an information request specifically.

THE CHAIRMAN: Oh, that's information request, okay.

MR O'DONOGHUE: As opposed to a compliance statement in particular.

THE CHAIRMAN: You are saying with a compliance statement, is the only breach provision or enforcement provision 117?

MR O'DONOGHUE: And 94A, which is the defining powers.

THE CHAIRMAN: 117, which we just looked at, that seemed to be talking about false or misleading information.

MR O'DONOGHUE: Yes, that's the individual giving the statement -- 94A is in relation to the undertaking.

THE CHAIRMAN: Okay. But where is the power in relation to someone who files a compliance statement which is true but doesn't in fact comply with the IEO, in the sense it doesn't provide the information required by it? Because it could be said by the person making the statement: everything I have said in my statement is not false, it's not misleading, it's true because I've caveated it. Where is the power to fine you if you file a statement which is incomplete? That's what I am looking for.

MR O'DONOGHUE: Well, Sir, we saw this in the 9 July letter, the CMA certainly takes the view that if you make qualified compliance in the way that Facebook has done, that that may be a breach of section 94A --

THE CHAIRMAN: Let's look at 94A. What page is that?

MR O'DONOGHUE: It's 134. It's 94A(1) and (2).

Sir, I think reasonable excuse may be the point.

THE CHAIRMAN: Okay, so it's not really 117, for the reasons I've given --

MR O'DONOGHUE: No, that's the individual who has certified compliance and done so on a misleading basis.

THE CHAIRMAN: Exactly. So looking at the individual's point of view, he's or she's going to say: well, everything I have said is not false or misleading, you look

at my statement, there's nothing in there that's unproved because I followed the right things.

So if we put that to one side, and Ms Demetriou will tell me if I have that one wrong for the individual, but if you are looking at Facebook's position, the relevant one is 94A, isn't it?

MR O'DONOGHUE: Yes.

MS DEMETRIOU: We agree with that, Sir.

THE CHAIRMAN: That's what I thought, I was getting a bit confused, a bit slow sometimes.

MR O'DONOGHUE: As we saw, in fact 117 and 94A have been mentioned in the CMA's letters to us.

THE CHAIRMAN: That doesn't mean it's right. I do not think 117 takes it very far given the points I have just made. I think the only one that really kicks in here on the facts is possibly 94A.

MR O'DONOGHUE: Yes. Well, Sir, as you saw in the 9 July letter, they did say, and I quote:

"Qualifying compliance in a separate document prepared by external legal advisers is not likely to constitute a reasonable excuse for failure to comply with the IEO (see paragraph 7.6 of CMA 108)."

So I mean that goes back to the dilemma -- those are the threats, for want of a better word, we were receiving and we obviously have to take them seriously.

THE CHAIRMAN: Of course you do, but what you have done though is that you are carrying on your business, carrying on doing transactions which possibly are inconsistent with the IEO but are consistent with the derogation requests that you have asked for. And you say, well, on the facts, the CMA should have

granted the derogation requests at the time we provided the compliance statement.

MR O'DONOGHUE: Yes, and they're saying: that's not good enough and we warned you we will fine you on that basis.

THE CHAIRMAN: Yes, okay.

MR O'DONOGHUE: You will then see in subparagraph 2 of 94A the level of penalty.

THE CHAIRMAN: Yes. It's not small.

MR O'DONOGHUE: Sir, is that a convenient moment? I'm about to move on to something different.

THE CHAIRMAN: Yes. We will move on. So we will come back again at 3.40 pm.

MR O'DONOGHUE: Thank you.

THE CHAIRMAN: Okay.

(3.30 pm)

(A short break)

(3.41 pm)

THE CHAIRMAN: Mr O'Donoghue?

MR O'DONOGHUE: Sir, thank you. Just to pick up on a couple of points raised before the break.

First, in relation to Mr Frazer's question as to whether the hiring of a GIF-related member of staff by Facebook; would that be captured?

Our position is that if the hire gives rise to a risk of pre-emptive action, then it would be a breach of the body of paragraph 4. If we can just quickly look at that, the IEO itself.

So there are essentially four parts to paragraph 4. In many ways the most important part is the body of paragraph 4 because that prohibits the taking of any action

which might prejudice a reference and so on.

Then (a), (b) and (c) are non-exhaustive examples of the types of conduct which might breach the body of paragraph 4.

So we say, yes, if there's a risk of pre-emptive action, that would be covered by paragraph 4. And by contrast, if there is no such risk, then we would respectfully suggest that the CMA has no interest and no statutory power to prohibit that. So essentially, Sir, there is no gap, if I can call it that, that would allow Facebook to take pre-emptive action on its own side.

MR FRAZER: Thank you, that's helpful.

MR O'DONOGHUE: A couple of other points. The chairman asked as to whether Facebook essentially has the choice to comply or simply freeze the business.

There's also a third possibility, which is where Facebook in principle wants to comply but it's simply not possible to comply on a global basis across 250 subsidiaries with bi-weekly reporting, and that's the point we developed in some detail in the notice of application at 32 to 42.

Sir, I am about to move on to what is essentially ground 1.

Can we start by looking at the guidance again. Before the break we saw what 72(2) says, and it says the CMA may by order, for the purpose of preventing pre-emptive action, prohibit or restrict the doing of certain things.

The guidance takes a different approach. If we can start at paragraph 2.29. So it's authorities tab 78, 4345, 2.29. It says:

"Given the need to impose an IEO quickly in completed mergers, any IEO imposed in these circumstances will almost always take the form of the standard template ..."

Then second:

"Discussions over the scope of the IEO in completed mergers will therefore almost always take the form of derogations ..."

THE CHAIRMAN: This is something that I raised at the CMC. Is there any provision in here, in the guidance, which you say is wrong and that shouldn't be followed by the CMA? Because the whole purpose of the guidance is to tell people what the CMA will do itself and what it expects other people to do. Is there any provision in here which you say actually that's not right and we shouldn't follow it?

MR O'DONOGHUE: No, Sir, we are not making a vires point.

THE CHAIRMAN: It's not a vires point, no.

MR O'DONOGHUE: If I can tee up what we do say, what we see from the first sentence we have just seen is that a single standard template IEO is imposed essentially reflexively in the case of completed mergers.

I mean, essentially, the minute the CMA learns about a completed merger, its default position will be to impose the standard template IEO --

THE CHAIRMAN: If it's going to have an IEO, yes, it's going to be a standard template one unless, yes, in the circumstances they are able to have something narrower such as, for example, where parties are aware there's likely to be an IEO, they'll write in saying: please bear in mind X, Y and Z.

MR O'DONOGHUE: Yes, but it's interesting in the 7 August letter at paragraph 26, the CMA says that it has imposed the template IEO in the case of all completed mergers since the publication of the guidance. So it does seem to be a default position. So that's the first point.

THE CHAIRMAN: Yes.

MR O'DONOGHUE: As we then saw on the second sentence I took you to in the

guidance, essentially the quid pro quo for imposing this what I would call reflexive template is that the discussion shifts very quickly and centrally to the question of derogations.

So we would submit that the cost of acting in this reflexive way comes at the price of engaging with these derogations quickly and meaningfully.

Now, in terms of the statutory framework, obviously section 72(2) does not require the generalised or default approach the CMA has set out in the guidance. It merely says the CMA may, by order, impose interim measures in respect of pre-emptive action risks.

The 2002 Act obviously does not require the use of a standard template either, and it certainly would not prohibit in any way the use of different templates for vertical mergers, non-UK mergers and so on.

So it leaves open those possibilities. We have made the point repeatedly that the problem, if I can call it that, with the standard template approach is that it would apply with equal force to a UK merger of the only two competitors in a market as it would to, say, a vertical merger that mainly involves non-UK businesses, such as here where GIPHY has no UK revenue.

So that is a striking feature.

The second striking feature, as we see in particular in paragraphs 5(b), (c) and (d), is the standard template envisages restrictions being imposed on the acquirer as well, and not just the target company. This obviously goes much further than, say, the EU Merger Regulation, which simply prohibits the putting into effect of the concentration and doesn't restrict, for example, the acquirer from hiring its own key staff or letting them go or changing product lines.

So the guidance takes a particular approach. We say it is strikingly blunt and

therefore the focus has to shift very quickly, as a matter of principle and as a matter of proportionality, to the question of derogations.

So that is by way of preamble to ground 1.

Now, in relation to ground 1, we put our submissions in really one of two ways.

1. The CMA has essentially not addressed its mind to the correct question. The question, as we saw under section 72(2) of the 2002 Act, is whether the granting of the COD requests might prejudice the CMA's remedial options, assuming, which we do not accept of course, that a remedy would be imposed.

The difficulty the CMA faces, it doesn't even ask this question, never mind answer it. Accordingly, we say it is not a case of trying to rationalise the reasons the CMA has given to see if they're good ones, it is a more profound problem that the CMA has not even rationally addressed its mind to the question that needs answering. In this sense, the response is manifestly irrational.

We say, in effect, the CMA has misdirected itself as to the correct question.

If we can start by looking at the 2 July letter, which is in hearing 1/F22 --

THE CHAIRMAN: Can you just take me to section 72 again so I can have a quick look at that.

MR O'DONOGHUE: Yes. So it's authorities 1, tab 3.

THE CHAIRMAN: Yes. Page?

MR O'DONOGHUE: Page 102.

THE CHAIRMAN: Thank you.

(Pause)

MR O'DONOGHUE: Sir, the basic test is the 72(2), "by order, for the purpose of preventing pre-emptive action". And it says "may", it doesn't say "must". And

then 72(8), it gives a definition of pre-emptive action, and it's essentially concerned with remedies.

Now, I will come to this but it does not require a standard template, it doesn't say the debate is only about derogations, and it doesn't say in particular that it's all about overlaps. So I will develop these points, but it's important to start with the statutory wording, which is (a) expressed in facultative terms, and (b) has a particular definition of pre-emptive action which is essentially grounded in the question of remedies and nothing else.

MR FRAZER: Mr O'Donoghue, in sub-section 8 it says action which might be one of two things:

"... prejudice the reference concerned or impede the taking of any action ... which may be justified by the CMA's decisions ..."

I'm assuming that when you say it's remedies related you are looking at the words:

"... impede the taking of any action ... which may be justified by the CMA's decisions ..."

Will you also be addressing the words "which might prejudice the reference concerned"?

MR O'DONOGHUE: Well, Sir, that may be more of a point for the CMA, more for me to reply in relation to. Certainly the way we had understood the case to date, it was being put in terms of overlapping activities and remedies, but I may need to come back to that.

MR FRAZER: Okay.

MR O'DONOGHUE: If we can go to the CMA's letter of 2 July, which is at hearing bundle 1, F22, paragraph 19(b), so it starts:

"... the CMA would not consent ..."

Does the Tribunal have that?

THE CHAIRMAN: Yes.

MR O'DONOGHUE: It says it's cautious. Then it says:

"... the CMA would not consent to remove Facebook (or any part of its business) from the scope of certain provisions of the IEO, unless it were satisfied that the activities of Facebook ... are unrelated to GIPHY's pre-Merger activities, whether horizontally, vertically or otherwise, such that there is no prejudice to the outcome of a reference or impediment to the taking of appropriate remedial action."

So that's why, Sir, in relation to Mr Frazer's question we had understood this is being put in terms of remedial action.

In the same vein then, tab 32, the 7 August letter, page 615, it's the last sentence:

"... the CMA is still in the early stages of its Merger investigation and does not yet have sufficient evidence to rule out horizontal concerns."

So our primary submission is that this is asking the wrong question. The question we saw in section 72(2) is whether the interim measures are necessary to prevent a risk of pre-emptive action. The question is not whether there are overlaps between the acquiring and target business.

Now --

THE CHAIRMAN: It's a relevant factor, isn't it? I don't necessarily take the view that just because there's an overlap there's a problem. There could be a problem, it just depends on the circumstances.

Is there a shifting in the CMA's position on this? Because are they now saying that if there is an overlap, it doesn't necessarily mean we will not grant some form of derogation?

MR O'DONOGHUE: Well, Sir, we'll see what Ms Demetriou says. What I'm showing the Tribunal on the basis of these two letters is they have consistently expressed the position that the existence of any overlap could itself be a problem.

THE CHAIRMAN: It could be a problem, I am not saying it's not going to be a problem, but it's not necessarily a problem. You see, one of the difficulties you've got, as I see it, is that your business is so integrated and there are so many overlaps that on many levels people are, in some respect, involved with GIPHY. So you can say some of your WhatsApp section is in one way dealing with GIPHY. Maybe one guy spends 5 per cent of his time on it, another guy may spend a lot more, but if that person is taken out of the equation from the Facebook side, it's neither here nor there if it's just a minor part of his day and what he's doing. It may be completely different for someone who is a person who's basically managing the relationship.

The fact that there is an overlap is relevant in deciding what derogation should be granted, but I don't think it's necessarily conclusive in every case, is it?

MR O'DONOGHUE: Well, Sir, I mean one could understand if this were a request by Facebook to integrate aspects of the GIPHY business pending the CMA's review, then the question of overlaps would be relevant. We certainly see that.

But we are not asking for any integration to take place --

THE CHAIRMAN: No, you are not, I know that, yes. So what's the paragraph number in the August letter that you took me to? I missed that.

MR O'DONOGHUE: It's paragraph 35, Sir.

THE CHAIRMAN: Okay.

MR O'DONOGHUE: We say this is a misdirection because the question is not whether there is any overlap, the question is whether the granting of the request we have made gives rise to a risk of pre-emptive action.

Indeed, it is difficult to see how if the CMA applied the approach set out in the two letters we have just seen, any undertaking could meet such a test, because the CMA of course is keen to make the point that until it reaches a terminus on its substantive assessment, it cannot be certain on the extent of horizontal, vertical or other overlaps.

But if that is right, then it is effectively saying that it cannot grant derogations from its standard template at all. And it seems that any overlap, because it does say in the 22 June letter horizontal, vertical or adjacent, that that is an even more demanding test than the substantive test for merger review.

We say this is clearly wrong because if that were the test it would never actually get answered, so the so-called initial enforcement order would in practice be a final one.

The Enterprise Act 2002, it does require, as we saw in section 72(8), for the CMA to engage, and I quote, "as soon as reasonably practicable" with the question of derogations, and if the CMA is applying a test whereby any overlaps would preclude it from doing so, then that effectively short circuits the CMA's ability to consider derogation requests on an interim basis.

The Enterprise Act, as we saw in section 72, contains a statutory test in relation to pre-emptive action and the CMA cannot in principle refuse to answer this statutory test and it must therefore open its mind to this issue in order to determine the statutory question, and simply saying that anything which involves links or overlaps and may therefore involve a potential remedy at the

end point isn't good enough.

We do again recall in this context that we are now four months down the track in terms of the CMA's engagement with this case -- you have seen the level of expenditure and engagement on our side -- so we are a long way away from 9 June, at which point the CMA was imposing the IEO and at that stage had very limited information about the case.

So we say that, on the question of overlaps in this case, the CMA has essentially misdirected itself. That might be a relevant question in the context of an integration request. It is not a relevant consideration in the context of a derogation applying only on the Facebook side.

We say it is obvious what the CMA should have done. It needs to examine each of the particular derogations sought, and in fact if one looks at the 7 August letter -- perhaps we can quickly turn to that.

THE CHAIRMAN: Yes.

MR O'DONOGHUE: It's in bundle 1, F32.

THE CHAIRMAN: Go by the paragraph numbers, I'm working from the hyperlink chronology.

MR O'DONOGHUE: Yes. It's paragraph 48, Sir. The first sentence. You will see that there's a double negative:

"At this early stage ... the CMA has not been able to determine that granting the Carve-Out Derogation Request would not result in pre-emptive action."

In our submission, that gets the statutory test backwards. The test is whether the request would result in pre-emptive action.

What one doesn't see in this letter is the CMA looking at each individual request and asking itself in relation to each one of them how would the granting of this

derogation give rise to a risk of pre-emptive action. One doesn't see that in any shape or form.

What one also doesn't see is the exercise we have been through this afternoon of looking at the IEO paragraph by paragraph and understanding what would be retained, what would be excised or amended and then asking itself, again on the basis of each individual derogation, how on the basis of this modified IEO is there any risk of pre-emptive action. It just doesn't do that.

It's a very basic question: if we granted this request, how would or might our remedial powers be affected? At no stage do you see the CMA grappling with that statutory question.

We say the CMA does not actually go through this exercise and does not therefore actually apply the statutory test, still less apply it to the particular derogations that we have put forward. So we say there is a basic failure to ground the CMA's position in the statutory test.

So that's the first point.

That's why we say in many ways we are beyond the realms of rationality. It's essentially a failure to engage with the statutory test and then apply that to the particular derogations in this case. So in a sense, that is even more irrational, but we do make the point that it's actually a more fundamental failure, through a clear misdirection.

So that is the first point.

The second point of principle we make in ground 1 is that we now see in Mr Romney's statement for the first time the CMA setting out its stall on pre-emptive action. If we can quickly go to Mr Romney's statement. It's in D1 of the first hearing bundle and it starts at paragraphs 84 to 87 on page 260.

So it's the bottom of 260.

If the Tribunal can just flick ahead, the heading is:

"The CMA's concerns about pre-emptive action and potential effect on remedies ..."

So this is the key passage. And the Tribunal will see that essentially it's a couple of pages and a small handful of paragraphs. So this is the full extent of engagement with the critical question of the risk of pre-emptive action and effect on remedial possibilities, so that's an optical point we make.

You then see at 84, so there's a reference to integration, which I will come back to, but if one then goes to 85, he makes two points. He mentions or alludes to the possibility of a divestiture on the Facebook side, which I will come back to, which we say is wrong, but then at 86, insofar as he descends into any specificity, he mentions a couple of things.

At paragraph 86, he mentions the so-called dowry, which is a strange expression, but he suggests that Facebook may need to pay some money to support a divested GIPHY business post remedy.

Now, this hasn't been mentioned before to Facebook and this is of course judicial review of the CMA's decision and it shouldn't be the subject of ex post embroiderment, but in any case it's clearly a bad point.

What he doesn't explain by reference to each of the derogations is why, if they were granted, the scope for a dowry would be affected.

It is hard to think how that could possibly be the case and it is equally difficult to understand how if, say, Facebook were allowed to sell assets or hire and fire staff, how that would affect its ability to pay this dowry.

Facebook can obviously afford the dowry in question.

Then at 86, the next paragraph, he also mentions behavioural commitments in

relation to future interaction with the divested business. We have no idea based on his statement what these commitments would be, and it plainly, in our submission, is not enough to say we might impose some unspecified behavioural commitments. But, again, the singular and recurrent failure we see is that he doesn't even begin to explain why, if the derogations we seek were granted, the CMA's remedial powers in relation to behavioural remedies might be affected, bearing in mind, as I said, the provisions of the IEO which would be retained.

So even now, in a witness statement in these proceedings, after the fact, the CMA fails to grapple with the essential question underpinning this application.

We are of course surprised that Mr Romney, now ex post, puts particular emphasis on behavioural remedies because he does say at paragraph 85 the CMA has a clear preference for structural remedies.

What we do not see in any shape or form from Mr Romney is any engagement with the provisions of the IEO in their amended form, and in particular what he doesn't engage with is if the modifications we have proposed in relation to paragraph 5(d) are retained, what impact would that have. He doesn't engage with the body of paragraph 4 or any of the subclauses. There is no attempt to connect what we are requesting with what would be retained.

We say it is obvious that there is no need to regulate Facebook's current conduct, let alone on a global basis, to preserve the possibility of regulating its future conduct. Otherwise any case in which a behavioural remedy was a possibility would ipso facto justify the template IEO, applying up to and including the remedy stage.

THE CHAIRMAN: What you are saying what we are going to have to do is we are

going to have to look at each of the individual derogations, look at the statutory purpose, section 72, look at the guidance and come to a view as to whether the derogation should have already been granted by the CMA; or is the CMA justified in saying, "We need further information before we can grant the derogation because we don't know necessarily the impact of giving, let's say, granting of a derogation sought on an individual aspect in full"; or would we need something which is different from what you are proposing, but probably different from what is in there at the moment.

It's very helpful that -- you started out by going through each individual derogation sought, and I would expect Ms Demetriou to do the same when she does her reply, is to take us through each one, going through those various factors.

MR O'DONOGHUE: Well, Sir, I'm very grateful, that's helpful.

THE CHAIRMAN: Because you have done your bit very clearly and I expect the CMA to do the same exercise on the same grounds.

MR O'DONOGHUE: I am grateful, so do we. I made two points so far. One in the letters before the application was issued, we do not see the CMA in any shape or form engaging with the individual derogations. So that's point 1.

Point 2 is that then when Mr Romney, perhaps seeing some writing on the wall, condescends to give any explanation -- so we have a small handful of paragraphs in a long statement. They do not engage in any shape or form with the individual derogations at all and they do not engage in any shape or form with the real issue, which is most of this IEO would remain intact and, given that that is the case, how does one then reconcile these derogations with what would be retained. And in particular what he doesn't do, really at any stage, is to map that on to the statutory test, which is if I grant this

derogation, given what I know about what's retained, what would be amended and what would go, does it give rise to a risk of pre-emptive action. We just don't see it.

That's why I said --

THE CHAIRMAN: Yes. And you need to factor in the aspect of proportionality at the same time.

MR O'DONOGHUE: Well, Sir, I will come --

THE CHAIRMAN: Not you but the CMA will have to. The CMA will have to because you can look at an individual provision but still the question is, is it proportionate to have that provision given you say all the other protections are there -- we don't need to go through all those, but you have three different levels. One is what is already in there which you are not challenging, you have a monitoring trustee and you have an HSM there, as well as you've got the compliance statements and position of GIPHY itself which is going to comply and fall with what's in there.

MR O'DONOGHUE: We say that's the intellectual exercise that the statute requires. It just hasn't been gone through in any shape or form by the CMA.

As I submitted, this does seem to stem from a misdirection, which is that unless and until they can reach a terminus on the question of overlaps, they can't grant these derogations. That is clearly wrong. If that's right, you never get a derogation, which apparently is not their position.

But there has been a fundamental failure to engage in a methodical way with the statutory test and to apply it, as I said, to each individual derogation.

But to be clear, Sir -- I mean, the Tribunal obviously has my point on proportionality, which I will come to, but I expect I do not need to labour. But at this stage, in

my submission, we are concerned with an anterior point, which is at the level of principle, there simply is no rational connection, because the CMA doesn't even analyse this, between the decision to grant or refuse the particular derogations and the statutory test.

Now, I will deal with the information and that has an aspect of proportionality, but at this stage in ground 1 I am still within the four walls of an area of principle before I get to proportionality, if that makes sense.

THE CHAIRMAN: It makes sense but I am not saying that I agree or disagree with it; that's one of the ultimate questions we have to decide at the end of this exercise.

MR O'DONOGHUE: Well, Sir, I'm putting my case at the level of principle first and then I will come to proportionality.

THE CHAIRMAN: Yes.

MR O'DONOGHUE: Just to tease out a couple of these points in terms of these methodical failures on the part of the CMA, if one thinks about, for example, behavioural remedy, if, say, Facebook is required to give access to GIPHY's library of GIFs to third parties on certain terms, then there is no reason rationally to think why that remedy might be impaired by Facebook making changes to its key staff, organisational structure and so on at this stage.

We do say, Sir, the point you picked up on, that that is a fortiori where Facebook would remain under a general obligation in paragraph 4 not to take pre-emptive action, not to integrate with GIPHY and so on.

The second point mentioned by Mr Romney at 86 is the question of source code.

THE CHAIRMAN: Just going back, is your case -- maybe it's a bit extreme -- that the CMA haven't even looked at the individual derogations on -- looking at it in

the way that you have opened it, because they're saying, "Well, we are not going to do that task now, we want the information first and once we have the information, we'll go through that exercise".

Is your case that they hadn't done the exercise in the first place, because of the reason they have given, which is that they say "We want further information before we do it"?

There are two different scenarios, I just want to know which one you say they are following.

MR O'DONOGHUE: Well, Sir, it is the former, but I have put it slightly differently. So we say essentially there has been a misdirection on the part of CMA. They have become hung up on the question of overlaps and we say the question under section 72, at least in this case, has to do with individual consideration of derogations and what is the risk of pre-emptive action? We accept at this stage the CMA doesn't need to show something definitive, of course we accept that, but it does at least have to show that the granting of these particular requests might give rise to pre-emptive action and it has not said in any shape or form why that is so.

In a sense, Sir, the exercise I am going through now is just to give you a couple of examples, picking up what Mr Romney said. I have taken you to behavioural remedies. We simply do not understand how on any rational basis one can connect these derogations to what he says on behavioural remedies. I mean it's a complete non sequitur. There is nothing on the basis of what he has outlined in 85 and 86 which would allow the Tribunal to understand on what basis they have concluded that the granting of these derogations gives rise to some problem or risk in the context of pre-emptive action in connection with

behavioural remedies.

I mean he just doesn't do it. All he literally says is, well, we might wish to impose a behavioural remedy. What he doesn't say, and what section 72(2) requires him to say, is in this case, given the derogations which we request and given what would be retained, why is there nonetheless a risk of pre-emptive action? He doesn't go through that analytical exercise.

So that's behavioural remedies. Can we just pick up quickly, he also mentions, in 87(a), a question of source code. That's the other detail he gives. We simply do not understand this point. He says if there's a remedy Facebook may need to delete the source code. But of course the CMA also says in the same breath that it doesn't think that is necessary now. But again, the critical point which he doesn't engage with is how, if the derogations are granted, the CMA's remedial powers would be affected.

We just don't see the logical connection. The code is sitting there on a server somewhere in Facebook. If something needed to be done, Facebook, as he says in 87(a), at that stage need to deploy resources over a period of six months to invest in a tool to delete the source code permanently.

We do not understand or see how that is logically connected with the carve-out derogation requests we have put forward.

It just doesn't go anywhere. I mean, what is source code sitting there on a server somewhere within Facebook got to do with these particular derogation requests?

There is no logical or rational connection. So insofar as Mr Romney provides any detail, all it does is serve to highlight the lack of any rational connection between the request we have made and the reasons the CMA has put

forward for not granting them.

I mean, it just doesn't go through any properly intellectual exercise which allows the Tribunal to understand what, for example, connects this source code issue with these particular requests.

The final thing Mr Romney mentions is at 87(b), which is the GIPHY termination of a revenue stream. We say this is another red herring, or a rational failure on the part of the CMA.

The first point to note is that Facebook did not buy this part of GIPHY, it was carved out. So there is no basis requiring Facebook to reinstate something it didn't buy. For the Tribunal's reference, that is Barbara Blank's first statement, paragraph 13(a). It's first bundle, C3, page 200.

In any event, it is very difficult to understand how this issue on the GIPHY side logically relates to the specific carve-out derogations sought only on the Facebook side.

Just to complete this, to highlight the absurdity of all of this, if we can quickly go to Alex Chung's second statement. It's in C4 of the hearing bundle, page 211. It's paragraph 14. If I can invite the Tribunal quickly to read through that.

THE CHAIRMAN: Yes.

(Pause)

MR O'DONOGHUE: He says in 14, this is US only, then he says at paragraph 10, last sentence:

"... more likely than not, it would have been wound-down [anyway]."

Then at 11, over the page, he says, well, I don't understand this point in any event, because in fact since the transaction was announced our user numbers have gone through the roof, so the business is doing extremely well.

THE CHAIRMAN: That may be in part due to the pandemic. It may be an unusual year. I don't know.

MR O'DONOGHUE: Sir, who knows.

THE CHAIRMAN: I am speculating.

MR O'DONOGHUE: One of the points, of course, the CMA makes is the suggestion that GIPHY is on its last legs, and nothing could be further from the truth, but anyway.

Then at 17 --

THE CHAIRMAN: As long as GIPHY can survive the cash flow, then it should be fine.

MR O'DONOGHUE: Well, Sir, yes. The reason this is a red herring is the business is driven by having users. I mean, that is the value of the business and insofar as they can obtain funding, which is a requirement under paragraph 5(b) of the IEO, the business will continue to succeed, and we see from the numbers that the business has been extremely successful since the transaction was announced.

Then just to round this off, at 17 he makes the point that these services which were wound down were loss-making, and in fact that winding those down gives GIPHY greater viability not less, because he makes the point their costs exceeded the revenue.

I showed this just to give the Tribunal a flavour of the absurdity of some of this, but the Tribunal does not need to decide any of this because there is an anterior problem, which is what is the logical connection for the purposes of section 72(2) between the point raised here in connection with source code and the particular derogation requests we have made.

What you don't see Mr Romney, even at this late stage, is any level of engagement with that question. The source code is left hanging there in the air and it is utterly disconnected from the question of pre-emptive action.

THE CHAIRMAN: In all these cases, there's a large number of points that both sides are making in the evidence and it's our job as a Tribunal to decide which are the ones that are the blind allies and which are the ones that really matter, and I don't think this case is going to turn on whether this source code remains on your server.

MR O'DONOGHUE: Well, Sir, I entirely agree with that. But I mean the point I am making good because I have to is we have seen the limited engagement by Mr Romney on the question of pre-emptive action, which is the only question in this application, and all we have are the three paragraphs I showed you and, in my submission, they don't go anywhere.

I mean, he doesn't even at any stage consider any of the individual requests we made.

THE CHAIRMAN: So what I have is both sides saying the other is not engaging. They are saying: you are not engaging with us because you are not giving us the information we need to consider the derogation requests and the scope properly. And you say they are not engaging because they are not looking at the individual derogation requests in the light of the statutory purpose and the other provisions and they should be granting you a derogation, whether in full or in part.

MR O'DONOGHUE: Well, Sir --

THE CHAIRMAN: That's what you are both doing.

MR O'DONOGHUE: Well, Sir, I mean, with respect, we would beg to differ.

THE CHAIRMAN: That's what the parties are saying. I'm not saying that's right or wrong, but I'm saying that's what the parties are saying about each other.

MR O'DONOGHUE: Well, Sir, I will come to the information issue very shortly. I don't accept what the CMA says. But what is manifest in what we have seen in Mr Romney is that he -- you can see it there in black and white -- he is not engaging in any shape or form with the individual requests we have put forward, looking at what is retained and coming up with any logical reason why the granting of those derogations gives rise to pre-emptive action.

One can see very quickly, if one unpacks source code, paid alignment and behavioural remedies, it doesn't amount to a row of beans.

So with respect, these are not equivalent points. I will come to the information. He has set out in black and white why, in a section headed "Pre-emptive action", there is such a risk. If one looks at this even very quickly, it doesn't go anywhere.

This is the only section of his statement, which is 48 pages, where he engages on the central point.

THE CHAIRMAN: I am making a note, one second.

MR O'DONOGHUE: Sorry, Sir, forgive me.

(Pause)

THE CHAIRMAN: Would it be fair to say that the question is: what is the risk of pre-emptive action and how did the derogation sought potentially adversely affect the CMA's ability to frame or implement an effective remedy if at the end of the day an SLC is found?

MR O'DONOGHUE: Sir, yes, and, parenthetically, bearing in mind the provisions of the IEO which would be retained.

(Pause)

We would also say Mr Romney cannot have it both ways. He cannot have a section in his statement saying, well, here are the risks of pre-emptive action, source code, behavioural remedies, paid alignment. We then engage with those and that has no consequences. I mean, he has put these up as his sort of greatest hits and it doesn't go anywhere. I mean I will come to the question of information, but we are entitled to tackle head on what he does put forward as being his concerns in relation to pre-emptive action, and they are hopeless, with respect.

They are not even rationally connected with any risk of pre-emptive action.

THE CHAIRMAN: I've got that point.

MR O'DONOGHUE: So, Sir, I said I would come back to paragraph 85 of Mr Romney where he does say that a remedy might include some of Facebook's assets or services. If I can just respond to that separately.

First, this would be something unprecedented. Our skeleton argument notes there have been more than 1,500 merger decisions in the UK and remedies imposed in about 4 per cent of those cases.

Second, there is no case in which the CMA has required both the divestiture of the target business and assets belonging to the acquirer.

Ms Demetriou's skeleton, footnote 4, mentions one case which concerns a different situation where the target business had effectively ceased to exist due to the acquirer's actions. I will deal with that in reply. But in any event that is a different set of circumstances under a different statutory regime.

So we say this would be unprecedented.

The lack of any precedent for both target and acquirer side simultaneous

divestitures, it is not a happenstance, it reflects a legal principle that in a merger context the effect on competition the CMA seeks to remedy has to be caused by the merger.

So if a firm acquires a target business then the nuclear option, if I can call it that, if there is a material competition concern, is to order the acquirer to sell the target business. This, of course, is logical. Why would the CMA require the acquisition by A of B to be remedied by the sale of A? A has bought B. The route back to the status quo ante is for A to sell B. We suggest this is a rather obvious point.

We see this legal principle in a number of contexts. If I can start with section 41 of the 2002 Act. It's in authorities 1, tab 3, page 50.

THE CHAIRMAN: But you accept that the dowry point is possible?

The dowry may be possible but then you say you have the resources anyway, so --

MR O'DONOGHUE: Yes.

THE CHAIRMAN: -- it's not a concern on the facts of your case. But you are saying that actually providing Facebook's services or assets goes too far? Because I can see scenarios where that may be appropriate. I am not saying it's appropriate in this case, and the fact that it's not been done before, it doesn't really bother me one way or another. I think it may stress it's unusual, but every case has to be decided on its own individual facts and circumstances.

MR O'DONOGHUE: Well, Sir, if I can develop the legal principle, we can then see where that takes us.

THE CHAIRMAN: Yes, see where it goes.

MR O'DONOGHUE: On the dowry, that is another example of a red herring. I mean, that has nothing to do with these derogation requests and I don't

understand why Mr Romney has raised this, but anyway.

So there's the statutory language of section 41, which in our submission deals with the question of the SLC caused by the merger.

Then we have the CMA's own guidance. I will just give you the reference, I don't think we need to turn it up. It's paragraph 5.6 of the remedies guidance this time, which is in authorities 77, page 4306. It says, and I quote:

"In identifying a divestiture package, the CMA will take, as its starting point, divestiture of all or part of the acquired business."

Just to flesh this out in the case law, if I can give the Tribunal a handful of references very quickly. So there's the Somerfield case, which is in authorities 2, tab 20, paragraph 99.

Why don't we quickly turn these up, starting with Somerfield. So it's page 790 of the authorities. It says:

"In particular, in our view, it is not unreasonable for the CC to consider, as a starting point, that 'restoring the status quo ante' would normally involve reversing the completed acquisition unless the contrary were shown. After all, it is the acquisition that has given rise to the SLC, so to reverse the acquisition would seem to us to be a simple, direct and easily understandable approach to remedying the SLC in question."

The next case is Eurotunnel. It's in tab 36 of the authorities at paragraph 395. I will just read out the quotations to speed things up. So there the Tribunal said, and I quote:

"It was stressed that the Commission was entitled to consider divestment of the acquired entity as a starting point where an anti-competitive outcome had been found to exist."

And there's a cross-reference to Somerfield.

Then BSkyB, which is tab 27 of the authorities, paragraphs 281 and 286:

"By considering the most extreme remedy of full divestiture first and concluding that it was effective, the Commission led itself wrongly to reject Sky's proposed remedies on the ground that they were not as effective as full divestiture."

Then at 286, the Tribunal endorsed Somerfield on this point.

If we can quickly turn up in hard copy the Stericycle case, tab 35, please. This is a judgment of the Tribunal at the time the Chairman was Vivien Rose, now Lady Justice Rose. If we can start at paragraph 16.

So at 16, the Tribunal notes --

THE CHAIRMAN: If you give me the bundle-page, if that's possible.

MR O'DONOGHUE: It's 1555. So the first sentence:

"The first of the four grounds on which Stericycle challenges the Report relates to the test applied by the CC in coming to its conclusion that full divestment of Ecowaste was the only effective remedy."

17:

"... the CC does, in accordance with the Guidelines, seek the least costly and intrusive remedy that will be effective in addressing the SLC identified, it is entitled to consider divestment of the entity acquired as a starting point ..."

So, Sir, we do note the CC guidance on this point is essentially the same as the CMA's guidance. Then 18:

"Using full divestment as a starting point is not the same as assuming that full divestment is necessary ... This stated that the panel had considered whether the divestiture of less than the whole of Ecowaste could be a feasible alternative to divestiture of the whole of Ecowaste but that it did not consider

that such a remedy would be effective in this case."

Then 21:

"We agree with the CC that it is not required to investigate of its own volition every possible configuration of divestment package before concluding that divestment of the business acquired is the only effective option."

Finally, Sir, a case that the Chairman may well remember, the ICE Trayport judgment. It's in tab 44 of the authorities. We don't need to turn it up, it's paragraph 101, and I quote:

"We agree that divestiture by ICE of its interest in Trayport would be an intrusive step, but not so seriously intrusive as an order for divestiture in a market investigation. This is because, in the case of a completed merger, the merging parties have taken the foreseeable risk that the CMA may make an order for divestiture. In contrast, an order for divestment in a market investigation context may be more intrusive, since it requires a change in the status quo and intervenes in an existing structure which, quite possibly comprises integrated activities that represent the product of investment and development over a long period of time."

So there, Sir, in my respectful submission, the Tribunal is contrasting a merger remedy, restoring the status quo ante with a market investigation remedy, which could in principle go much further and involve changing the status quo ante.

So we say what one sees from the legislation, from the CC guidance and the CMA guidance and from the five authorities I've shown the court, is that there is a clear legal principle that the divestiture of the target is the CMA's most extreme remedial option.

It is unprecedented, as I said, to have a suggested remedy whereby, in addition to the target, assets on the acquiring side would also be divested.

Now, the reason, of course, we make this point is that, given that the IEO would remain fully intact insofar as concerns GIPHY and given the obligations, in paragraph 4 in particular, in relation to both Facebook and GIPHY, that the CMA's remedial options in this case are fully preserved.

THE CHAIRMAN: When you say that their remedial options are fully preserved, do you include the possibility of assets and services of Facebook being transferred over as part of a divestiture package to a potential acquirer?

MR O'DONOGHUE: Well, Sir, the reason I made the point of principle, as we say that would be contrary to the principle of causation that I've outlined.

THE CHAIRMAN: Yes, I understand that, but the thing is that the CMA's position may be that what we're doing is we're looking at potential theories of harm, potential remedies at this stage. But we are still fairly early on, though I know you point out that it's still some time since the beginning of the investigation.

They don't actually know what remedy they are going to impose, if they need to, if an SLC is found. So they need to keep all the possible options open, subject to a point that you may want to make, which is that the options they have got open, one is just inconceivable that would ever apply in practice.

But it's quite an extreme finding for us to say that it's inconceivable that if a remedy is going to be imposed, that that remedy may include some element of assets or services being transferred.

MR O'DONOGHUE: Well, Sir, you have my submissions on the legal point.

THE CHAIRMAN: Yes, I understand the legal point, yes.

MR O'DONOGHUE: Yes. And you have my submission that there is no previous

case like this, and I hear you, Sir, well: never say never.

THE CHAIRMAN: It would be very unusual, in my experience, to have a package that requires assets of the acquiring company to be handed over as part of a divestiture package. It would be unusual, definitely.

Whether it's impossible, I doubt. I can see various scenarios where it would arguably be appropriate and within the CMA's powers to impose that.

MR O'DONOGHUE: Sir, it may be a reply point from me, but you have my legal points.

THE CHAIRMAN: We have your legal points and we will see what Ms Demetriou says about the fundamental point about --

MR O'DONOGHUE: It also, in my respectful submission, goes to the question of proportionality because if the CMA is at least in the realms of something which is unprecedented, then in my submission it is all the more incumbent upon the CMA to explain, with some degree of precision, albeit understanding the stage at which we're at, why this extraordinary remedy is a realistic possibility, or is something which can fairly be taken into account at this stage.

Beyond what I would call a bit of hand-waving, they haven't attempted to do that.

I mean, what you essentially see Mr Romney is -- he picks up on a couple of integration points, the source code and the paid alignment, and they are put forward as sort of the key reasons why there would be a need -- because of this integration. These are put forward as the key reasons why there might need to be something completely unprecedented in this case.

Bearing in mind that at least this would be unprecedented, and given the nature of the reasoning we have seen in relation to the source code and paid alignment, in my submission it does not come anywhere close to grounding, in

any rational, certainly proportionate way, what the CMA needs to establish.

I mean, frankly, if the high water mark of this point is the source code or the paid alignment, I would suggest the CMA is in some considerable difficulties.

The Tribunal, of course, has my point that if the CMA was genuinely concerned about this historic integration, its own guidance says that it should have imposed interim unwinding orders in this case.

If we can go back to the guidance on that point, it's worth looking at.

THE CHAIRMAN: Let's have a look at it, because my inclination would be that they have an option whether to do it now or to wait until the end of the investigation and then impose a remedy then. I am not sure if they are obliged to take a step now. Let's have a look at it.

MR O'DONOGHUE: Yes. It's 78 of the authorities.

THE CHAIRMAN: Yes, what paragraph?

MR O'DONOGHUE: It's 3.23.

THE CHAIRMAN: Let's have a look.

MR O'DONOGHUE: 3.21, forgive me.

THE CHAIRMAN: Sorry, 2.21?

MR O'DONOGHUE: 3.21, 4353.

THE CHAIRMAN: Yes, we have looked at that before. The point is it's got power, but it doesn't have to do it. Because it may say, "We can deal with this at the end of the day if we need to", and SLC is found. It does not matter if we deal with it now, does it? It should deal with it now if it means it's going to affect the ability to impose an effective remedy at the end of the day.

But if it takes a view that it can deal with it -- it does not need to deal with it now because at the end of the day they can still impose an effective remedy later

on, they may say let's leave it until later on, that's the proportionate way of doing it.

MR O'DONOGHUE: Well, Sir, perhaps, but in either scenario that is a point in my favour.

THE CHAIRMAN: I am not saying it's in anyone's favour, but I'm saying that this only gives them the power, it doesn't require it to take a step now, if it feels that in its own discretion they can deal with it if necessary at the end of the day. If they get that far.

MR O'DONOGHUE: Well, Sir, in my submission one can go further.

3.21 says: if it judges it necessary to preserve the CMA's ability to pursue its investigation or to implement effective remedy.

So we would submit that, at least as of today, the CMA apparently thinks on an interim basis it is not necessary to unwind the pre-IEO steps to preserve its remedial action. It hasn't even said that if it gets to the end of the investigation, at that stage, it would need to unwind integration as a final measure. It has not said either --

THE CHAIRMAN: It cannot say that now because one of the purposes of the investigation is to make that decision, and, if they made that decision today, you would say, "Well, you are pre-empting the result of your own investigation".

MR O'DONOGHUE: Well, Mr Romney has gone off the fence in terms of, "Well, we may need to divest Facebook assets". There's no reason by parity of reasoning why he should not equally get off the fence and say, "We think we will need to unwind", and he does not say that.

THE CHAIRMAN: My impression of Romney, and it may be an unfair impression,

I've read it three times now, is that he is on the fence and he's not going to come off the fence because he is saying that there are many things up for grabs in the investigation, and that when it comes to the end of the investigation we'll see where we are.

But all he can do at this stage is to give you the possibilities. It would be unsatisfactory if, every time the CMA is at the beginning of an investigation, it is required to explain to the Tribunal its precise possible thinking. Because in these cases, you know, your thinking evolves over time so what may be, say, a fruitful line of enquiry over the beginning, you find out fairly soon is a dead end, it's a non-point, and there may be things you do not pick up at the beginning that actually come home at the end, and then when you issue your final report you will have things in there that you didn't even think were likely at the time when you started. And there's another possibility --

MR O'DONOGHUE: I see all that --

THE CHAIRMAN: -- this whole exercise and find that there's no SLC. We are in the scenario whereby they may not find an SLC. I am not saying they will, I am not saying they won't; I just don't know.

MR O'DONOGHUE: I see all that. The simple point I am making is that we do know the CMA can and does impose these interim unwinding orders.

THE CHAIRMAN: They do, yes, and I have dealt with them.

MR O'DONOGHUE: What can certainly be stated as of today is they have not seen fit to do so in this case, and that, in my submission, is a relevant consideration in the context of pre-emptive action.

THE CHAIRMAN: Yes.

MR O'DONOGHUE: It's all very well to complain about this historic integration but if,

as Mr Romney himself says, we are not actually saying that Facebook at this stage needs to do anything. It is difficult to see where that takes him.

THE CHAIRMAN: Well I hope that no one is complaining about the integration to date by Facebook. It's a fact of life that you have integration after completion. I don't see the CMA criticising you for it, they just say, "Well, this is what's happened, and, given the degree of integration so far, that's a relevant factor in us deciding where we go on the IEO". But I am not sure if they are going further, to actually criticise you for the integration that's taken place. If they did, that would be unfair, in my view.

MR O'DONOGHUE: Well, Sir, I agree with that, it is a voluntary regime.

To that extent, yes, they do not criticise us. But what they have certainly put forward, as you see in Mr Romney 85 to 87, is that, putting it neutrally, their integration steps which did take place, which they suggest are relevant and material to the question of pre-emptive action -- we've been through Romney, and we do not understand how that submission can be made.

I mean, the examples we have seen, the behavioural remedies, the source code and the paid alignment, just don't go anywhere. So that has completely fizzled out and that is the only concrete things he puts forward in terms of pre-emptive action, and we are entitled to make the submissions we did in relation to those.

THE CHAIRMAN: Yes.

MR O'DONOGHUE: But, Sir, I do come back to the overarching point, which is how is the granting of these derogations rationally connected to the question of remedies?

Just to unpack this a little, suppose for example that GIPHY lacked sales staff with

sufficient knowledge of its products. In our submission, you wouldn't remedy that by transferring Facebook ad sales staff that have never worked at GIPHY and have never sold a search ad.

Likewise, if GIPHY and ad sales contracts had been terminated, you couldn't remedy that by transferring Facebook sales contracts for ads to GIPHY. The customer would need to give consent, it probably would refuse, and the ads are different.

The appropriate response would be for GIPHY to resurrect the prior contracts and for Facebook to bear the costs of doing so.

The same point can be made in relation to the termination of pre-merger supply contracts, including things like legal services.

The CMA hasn't even attempted to explain why this gives rise to an ongoing risk of pre-emptive action and, if it does, why that would be mitigated by maintaining the carve-out provisions.

So it is very difficult to think how, logically and rationally, things to do with the Facebook side, which would be affected by the granting of these derogations, have any bearing at all on the question of remedies, never mind one which gives rise to a risk of pre-emptive action.

THE CHAIRMAN: So one of the things for Ms Demetriou tomorrow is to answer that question: how are the derogations rationally linked to the pre-emptive remedies?

MR O'DONOGHUE: Sir, yes. We don't see it in their defence, it's not in their skeleton, and insofar as Mr Romney has a half-hearted attempt to engage with this point, in my submission it is rather blown up in his face; it just doesn't go anywhere.

So, Sir, I see the time.

Discussion re timetable

THE CHAIRMAN: Shall we just look at the hearing timetable then.

How long do you think you are going to be tomorrow? There is still ground to cover because you have the information requests to deal with, haven't you?

MR O'DONOGHUE: Yes. I hope I can comfortably finish in under an hour.

THE CHAIRMAN: Okay. So Ms Demetriou, how long do you think you are going to be?

MS DEMETRIOU: Well, I am a little bit now squeezed for time because I had rather assumed that Mr O'Donoghue might make better progress, because he's had half an hour longer today, so I was rather hoping he might finish by 11.

THE CHAIRMAN: Okay. What I suggest we do is we will start at 10.15, okay, so hopefully he will have finished by, at the latest, 11.15. We will sit until 5, which should give you enough time. Mr O'Donoghue, is that fine with you, 10.15?

MR O'DONOGHUE: Sir, yes, that's absolutely fine, I'm very grateful.

THE CHAIRMAN: Ms Demetriou, is that fair? Mr O'Donoghue has the hardest task, in a way, because he's had all the questions from me and he's got to open the case. By the time, Ms Demetriou, you address us, a lot of the issues will have crystallised and the background already explained. So, although you are not going to have exactly the same amount of time, hopefully you are going to have enough time to deal with the points you wish to make.

MS DEMETRIOU: Sir, I think that will be fine, and I am grateful for the Tribunal for sitting earlier and later.

THE CHAIRMAN: Yes. I think we will be fine.

Mr O'Donoghue, you have given us a lot of things to think about overnight. I am not sure if I have any specific things that I would like you to address tomorrow morning, over and above carrying on as you are at the moment.

MR O'DONOGHUE: Well, Sir, obviously the information requests from the CMA's perspective are effectively their only point, and I will deal with those comprehensively.

THE CHAIRMAN: I am sure you will. Okay, thank you very much. I will see everyone tomorrow at 10.15.

MR O'DONOGHUE: Thank you.

(5.00 pm)

(The hearing adjourned until 10.15 am on Tuesday 20 October 2020)